WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOL. IV

WISCONSIN
CRIMINAL
JURY INSTRUCTIONS
COMMITTEE

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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME IV

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

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• Includes Release No. 57

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2660-2665 INTRODUCTORY COMMENT

[WITHDRAWN AND REPLACED BY WIS JI-CRIMINAL 2600]

COMMENT

Material describing issues relating to "drunk driving" offenses was first published as Wis JI-Criminal 2660-2665 Introductory Comment in 1982. It outlined the major changes in Wisconsin law made by Chapters 20 and 184, Laws of 1981. The most significant of those changes was the creation of offenses based on the alcohol concentration of the driver. The material was significantly revised in 1993 to emphasize the changes made by 1991 Wisconsin Act 277. The most significant of those changes, at least in terms of its effect on the jury instructions, was the creation of "0.08" as the level of prohibited alcohol concentration for offenders with two or more prior offenders.

In 2004, this material was withdrawn and replaced by Wis JI-Criminal 2600. The discussion was substantially expanded to collect all explanatory material relating to "operating while intoxicated offenses" — those in the Motor Vehicle Code and in the Criminal Code.

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2660 OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CRIMINAL OFFENSE — 0.08 GRAMS OR MORE — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

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How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device.

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However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660 was originally published in 1982 and revised in 1985, 1993, and 2004. This revision was approved by the Committee in June 2005.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

The prohibited alcohol concentration is 0.02 for persons who have 3 or more prior convictions, suspension or revocations, as counted under § 343.307(1). See § 340.01(46m)(c) and Wis JI-Criminal 2660C.

This instruction is for a criminal offense under § 346.63(1)(b), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals 2 . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

The penalty for criminal violations of § 346.63(1) increases with the number of prior convictions the defendant has. See § 346.65(2). Fifth and subsequent offenses are Class H felonies. § 346.65(2)(e). This instruction may be used without change for all criminal violations. Although the number of priors is a fact

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that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

The maximum penalty for this offense is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2)(f) and Wis JI-Criminal 999.

First violations of the statute are forfeitures, see Wis JI-Criminal 2660A. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration — blood alcohol or alcohol in the breath — in the definition of the second element. For cases involving the 0.02 level, see Wis JI-Criminal 2660C.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600, Introductory Comment, Sec. V.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

9. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2660A OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CIVIL FORFEITURE — 0.08 GRAMS OR MORE — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency [3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[8]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

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How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify prosecuting agency is not required to prove the underlying scientific reliability of the method used by the

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testing device. However, the (identify prosecuting agency is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660A was originally published in 1982 and revised in 1985, 1993, 2004, 2006, and 2014. The 2014 revision added to the Comment to refer to the finding required for installation of an ignition interlock device. The 2015 revision made a nonsubstantive correction in the Comment.

The 2004 revision reflected the change in the prohibited alcohol concentration [PAC] level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a first offense under § 346.63(1)(b), which is punished as a forfeiture. For criminal violations, see Wis JI-Criminal 2660. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

For first offenses under § 346.63(1) where the defendant has a prohibited alcohol concentration of 0.15 or more, "[a] court shall order a person's operating privilege . . . be restricted to operating vehicles that are equipped with an ignition interlock device and . . . shall order that each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration be equipped with an ignition interlock device . . . "See § 343.301(1g) intro. and (b)1. The Committee concluded that whether the alcohol concentration was 0.15 or more is not an issue that must be submitted to the jury. Installation of the device is not a penalty and thus is not subject to the rule of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which requires that

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all facts that increase the penalty for a crime be submitted to the jury. Thus, the judge makes the necessary finding when it is alleged that the 0.15 level is an issue.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

In City of Omro v. Brooks, 104 Wis.2d 352, 311 N.W.2d 620 (1981), the Wisconsin Supreme Court discussed the propriety of directing a verdict against the defendant in a forfeiture action for operating under the influence. The court held that the trial court erred not directing a verdict of guilty on the facts of that case. Brooks dealt with a charge of operating under the influence under a municipal ordinance in conformity with the state statutes, which at that time did not include a prohibited alcohol concentration offense. And, the evidence showing that the defendant in Brooks was under the influence was completely uncontradicted — the defendant testified and admitted the fact.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration — blood alcohol or alcohol in the breath — in the definition of the second element.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The definitions are provided in § 340.01(46m) and (1v). See note 2, supra.

9. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2660B OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CIVIL FORFEITURE — 0.08 GRAMS OR MORE — § 346.63(1)(b)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2660B was originally published as Wis JI-Criminal 2660.1 in 1992. It was renumbered Wis JI-Criminal 2660B in 1995 and revised in 1998. It was withdrawn in 2003 when the generally applicable prohibited alcohol concentration was reduced from 0.10 to 0.08. Offenses involving the 0.08 level are now covered by Wis JI-Criminal 2660.

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2660C OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CRIMINAL OFFENSE — MORE THAN 0.02 GRAMS — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [two] [three][3] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[8]

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[more than .02 grams of alcohol in 210 liters of the person's breath].

[more than .02 grams of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[9]

[3. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).][10]

IF THE THIRD ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[11]

[Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant drove or operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[12]

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IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660C was originally published in 2002 and revised in 2004. This revision was approved by the Committee in March 2007; it corrected the reference to the prohibited alcohol concentration.

This instruction is drafted for offenses involving a prohibited alcohol concentration level [PAC] of more than .02, which applies to persons with three or more priors. See § 340.01(46m)(c), created by 1999 Wisconsin Act 109. [Effective date: January 1, 2001.]

Note that § 340.01(46m)(c) defines the prohibited alcohol concentration for persons with three or more priors as "more than 0.02." This differs from the generally applicable level, referred to as "an alcohol concentration of 0.08 or more." See § 340.01(46m)(a).

The fact of having three or more priors is included as a bracketed third element in this instruction. It is an element because the existence of priors changes the substantive definition of the crime from an alcohol concentration of .08 or more to one of more than .02. It is in brackets because it is not to be submitted to the jury if the defendant admits having the priors. See footnotes 3 and 9, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

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2660D OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CRIMINAL OFFENSE — MORE THAN 0.02 GRAMS — SUBJECT TO AN IGNITION INTERLOCK ORDER — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [two] [three][3] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[8]

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[more than .02 grams of alcohol in 210 liters of the person's breath].

[more than .02 grams of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION THAT HE OR SHE IS SUBJECT TO AN ORDER UNDER § 343.301 DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[9]

[3. The defendant was subject to a court order under § 343.301 requiring the installation of an ignition interlock device.][10]

IF THE THIRD ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[11]

[Evidence has been received that the defendant was subject to a court order requiring the installation of an ignition interlock device. This evidence was received as relevant to this element only. It must not be used for any other purpose and, particularly, it is not proof that the defendant drove or operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[12]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

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[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660D was approved by the Committee in December 2010.

This instruction is drafted for offenses involving a prohibited alcohol concentration level [PAC] of more than 0.02, which applies to persons subject to an order under § 343.301 requiring the installation of an ignition interlock device. See § 340.01(46m)(c), as amended by 2009 Wisconsin Act 100. [Effective date: July 1, 2010.]

Note that § 340.01(46m)(c) defines the prohibited alcohol concentration as "more than 0.02." This differs from the generally applicable level, referred to as "an alcohol concentration of 0.08 or more." See § 340.01(46m)(a).

The "more than 0.02" PAC level also applies to persons who have 3 or more prior convictions, suspensions, or refusals as counted under § 343.307(1)." See Wis JI-Criminal 2660C.

The fact of being subject to an order under § 343.301 is included as a bracketed third element in this instruction. It is an element because the existence of that fact changes the substantive definition of the crime from an alcohol concentration of 0.08 or more to one of more than 0.02. It is in brackets because, by analogy to the case where prior offenses reduce the level to 0.02, it is not to be submitted to the jury if the defendant admits being subject to the order. See footnotes 3 and 9, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

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Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the definition of "prohibited alcohol concentration."

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration — blood alcohol or alcohol in the breath — in the definition of the second element.

3. The instruction is drafted to allow for use with either two or three elements, depending on whether the third element, relating to the defendant being subject to an order under § 343.301, is submitted to the jury. See discussion at note 9, below.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

9. The third element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for 0.02 offenses involving prior convictions. See Wis JI-Criminal 2660C. State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997) addressed an earlier version of the OWI law which reduced the PAC level to 0.08 if the defendant had prior convictions. In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside

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the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
> 214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. The existence of an ignition interlock order implies the existence of a prior OWI offense, creating the same risk of unfair prejudice that concerned the court in Alexander. If the defendant admits the "status element," the instruction should be given with two elements: by operating a vehicle, and, having an alcohol concentration of more than 0.02. If the defendant does not admit the "status element," the instruction should be given with a third element: being subject to an order under § 343.301.

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element." See Wis JI-Criminal 162A Law Note: Stipulations.

10. This element is not to be included if the defendant admits being subject to the order. See note 9, supra.

11. Making the fact of being subject to an order under § 343.301 an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

12. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of .02 or more any prima facie effect. So there is no statutory authority for the typical statement that discusses test results like the ones included in the instructions for 0.08 offenses. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2661 OPERATING A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION AND CAUSING INJURY — 0.08 GRAMS OR MORE — § 346.63(2)(a)2.

Statutory Definition of the Crime

Section 346.63(2)(a) of the Wisconsin Statutes is violated by one who causes injury to another by the operation of a vehicle[1] on a highway[2] while that person has a prohibited alcohol concentration.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle[4] on a highway.[5]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[6]

2. The defendant's operation of a vehicle caused injury[7] to (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[8] in producing the injury.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

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Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[9]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[10]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[11] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[12] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

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[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 346.63(2)(b), USE THE FOLLOWING CLOSING:[14]

Jury's Decision

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 346.63(2)(b), USE THE FOLLOWING CLOSING:[15]

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the injury would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[16] that this defense is established.

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"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[17]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[18] does not by itself provide a defense to the crime charged against the defendant.[19] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the injury would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[20]]

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COMMENT

Wis JI-Criminal JI-Criminal 2661 was originally published in 1982 and revised in 1985, 2004, 2006, and 2015. This revision was approved by the Committee in August 2017; it added footnote 7.

This instruction is drafted for violations of § 346.63(2)(a)2. involving a prohibited alcohol concentration [PAC] of .08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. For persons with three or more priors, the PAC level is .02.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 2665 for the related offense of causing injury while operating under the influence, as defined in § 346.63(2)(a)1. For cases involving two charges — operating under the influence and with a PAC — Wis JI-Criminal 1189 can be used as a model.

Section 346.65(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 15 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 2662, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The penalty for violations of § 346.62(2)(a) doubles if a child was in the vehicle at the time of the offense. See § 346.65(3m) and Wis JI-Criminal 999. A similar provision in the Criminal Code was repealed by 2001 Wisconsin Act 109 and recreated as a sentencing factor, but § 346.65(3m) was not affected.

In State v. Smits, 2001 WI App 45, 241 Wis.2d 374, 626 N.W.2d 42, the court held that operating while intoxicated offenses are not lesser included offenses of the "causing injury" offenses defined in § 346.63(2).

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Note that § 346.63(2)(a) uses the phrase "operation of a vehicle." This differs in two respects from the way other offenses under § 346.63 are defined. First, it refers to "operate," not "drive or operate." Second, it refers to "vehicle" not "motor vehicle." The Committee assumed that these differences were intentional on the part of the legislature. The use of "vehicle" may be justified by the fact that offenses involving injury are considered to be more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct — namely, the operation of devices which do not fall within the definition of "motor vehicle." As to the use of "vehicle," this rationale was cited with approval in State v. Smits, 2001 WI App 45, ¶16, 241 Wis.2d 374, 626 N.W.2d 42.

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2. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

3. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration — blood alcohol or alcohol in the breath — in the definition of the second element. For cases involving the 0.02 level, see Wis JI-Criminal 2660C.

4. See note 1, supra. Section 340.01(74) defines "vehicle" as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

6. Regarding the definition of "operate," see § 346.63(3)(b) Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. "Injury" was undefined by statute until 2013 Wisconsin Act 224 [effective date: April 10, 2014] created § 346.63(2)(c) to define it as "substantial bodily harm," cross-referencing the definition of that term in § 939.22(38). Section 346.63(2)(c) was repealed by 2015 Wisconsin Act 371 [effective date: April 27, 2016], again leaving "injury" undefined. The version of this instruction published before the 2014 statutory change did not define injury, but included a briefer version of the foot note that follows. There have been no directly applicable developments since it was published.

> The instruction does not define "injury" because it is not defined in the statutes or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, regarding whether "pain" is sufficient to constitute "injury." In a prosecution under § 346.63(2)(a), the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] However, in a prosecution under § 940.225(2)(b), where "injury" is also used, the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm." [Originally published as footnote 8, Wis JI-Criminal 2665 © 2009.

8. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

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There may be more than one cause of injury. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 14, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of injury as required by the second element. If the defendant's operation caused the injury, the defense allows the defendant to avoid liability if it is established that the injury would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care. The constitutionality of eliminating causal negligence as an element of § 940.09 and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

9. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600, Introductory Comment, Sec. V.

10. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2690 Introductory Comment, Sec. VII.

14. Section 346.63(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

15. See note 14, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

16. Section 346.65(2)(b) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

17. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

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18. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

19. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 346.63(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 17, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

20. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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2661A OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION AND CAUSING INJURY — 0.08 GRAMS OR MORE — § 346.63(2)(a)2.

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2661A was originally published as Wis JI-Criminal 2661.1 in 1992. It was renumbered Wis JI-Criminal 2661A in 1995 and revised in 1998. It was withdrawn in 2003 when the generally applicable prohibited alcohol concentration was reduced from 0.10 to 0.08. Offenses involving the 0.08 level are now covered by Wis JI-Criminal 2661.

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2662 OPERATING A VEHICLE WHILE INTOXICATED AND CAUSING INJURY: AFFIRMATIVE DEFENSE UNDER § 346.65(2)(b)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2662 was originally published in 1993 and revised in 1997, and 1998. It was withdrawn in 2004.

This instruction provided material describing the affirmative defense that applies to violations of § 346.63(2)(a). The material was to be added to the instructions to the instructions for the applicable offenses. In 2004, the instructions for violations of § 346.63(2)(a) were revised to incorporate instruction on the defense. See Wis JI-Criminal 2661 and 2665.

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2663 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CRIMINAL OFFENSE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[7]

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Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[8]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[9]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[10] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[11] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question

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on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663 was originally published in 1966 and revised in 1978, 1981, 1982, 1986, 1993, and 2004. This revision was approved by the Committee in June 2005.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

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The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals 2 . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

The penalty for criminal violations of § 346.63(1) increases with the number of prior convictions the defendant has. See § 346.65(2). Fifth and subsequent offenses are Class H felonies. § 346.65(2)(e). This instruction may be used without change for all criminal violations. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

The maximum penalty for this offense is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2)(f) and Wis JI-Criminal 999.

First violations of the statute are forfeitures, see Wis JI-Criminal 2663A. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

For offenses involving operating under the influence of a controlled substance, see Wis JI-Criminal 2664.

For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

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6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

10. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the "blood alcohol curve," see Wis JI-Criminal JI 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2663A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CIVIL FORFEITURE — § 346.63(1)(a)

Statutory Definition of the Offense

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant.[2]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[8]

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Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[9]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[10] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[11] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are

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here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify prosecuting agency is not required to prove the underlying scientific reliability of the method used by the testing device. However, the (identify prosecuting agency is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663A was originally published in 1981 and revised in 1982, 1986, 1992, and 2004. This revision was approved by the Committee in October 2005.

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The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a first offense under § 346.63(1)(a), which is punished as a forfeiture. For criminal violations, see Wis JI-Criminal 2663. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

In City of Omro v. Brooks, 104 Wis.2d 352, 311 N.W.2d 620 (1981), the Wisconsin Supreme Court discussed the propriety of directing a verdict against the defendant in a forfeiture action for operating under the influence. The court held that the trial court erred not directing a verdict of guilty on the facts of that case. Brooks dealt with a charge of operating under the influence under a municipal ordinance in conformity with the state statutes, which at that time did not include a prohibited alcohol concentration offense. And, the evidence showing that the defendant in Brooks was under the influence was completely uncontradicted — the defendant testified and admitted the fact.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

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9. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

10. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2663B OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CIVIL FORFEITURE — NO ALCOHOL CONCENTRATION TEST — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant.[2]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[8]

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Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

IF THE CASE INVOLVES A TEST REFUSAL, ADD THE FOLLOWING:[9]

[Testimony has been received that the defendant refused to furnish a (breath) (urine) sample for chemical analysis. You should consider this evidence along with all the other evidence in the case, giving to it the weight you decide it is entitled to receive.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663B was originally published in 1986 and revised in 1992, 2004, and 2006. This revision was approved by the Committee in October 2018; it removed reference to "blood" in the paragraph relating to test refusal. See footnote 9.

This instruction is an adaptation of Wis JI-Criminal 2663A for a case where no evidence of an alcohol concentration test has been admitted. In place of the paragraphs relating to evidence of test results, the

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text of Wis JI-Criminal 235, dealing with a test refusal, is substituted, based on the assumption that in most "no-test" cases, the defendant has refused to take one.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. The material in brackets is the text of Wis JI-Criminal 235. The leading case affirming the admissibility of test refusal evidence is State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980). The defendant's explanation for the refusal is also admissible. State v. Bolstad, 124 Wis.2d 576, 370 N.W.2d 576 (Ct. App. 1985).

The 2018 revision removed reference to a blood test in light of recent decisions from the United States and Wisconsin Supreme Courts. In Birchfield v. North Dakota, 579 U.S. —, 136 S.Ct. 2160 (2016), the court held that it is unconstitutional to make it a crime to refuse a warrantless blood test after being lawfully arrested for OWI – where exigent circumstances were not shown. However, the court also stated:

> "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws and nothing we say here should be read to cast doubt on them." 136 S.Ct. 2160, 2185-86.

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In State v. Dalton, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120, the defendant was subjected to a warrantless blood draw that was justified by exigent circumstances. The Wisconsin Supreme Court held that a trial court erred by expressly relying on the defendant's refusal to consent to the blood draw to increase his sentence within the allowed statutory range:

> Dalton was criminally punished for exercising his constitutional right. Established case law indicates that this is impermissible. ¶61.
>
> . . . the circuit court violated Birchfield by explicitly subjecting Dalton to a more severe criminal penalty because he refused to provide a blood sample absent a warrant. ¶67.

Neither Birchfield nor Dalton holds that commenting on a blood test refusal is improper, but the Committee decided to remove reference to a blood test from the text of the instruction to avoid possible issues as this area of the law continues to develop.

NOTE: In State v. Hawley, 2014 AP 1113-CR, the Wisconsin Court of Appeals certified the case to the Wisconsin Supreme Court for a "final resolution" whether implied consent applies to blood draws of unconscious individuals. The certification is being held in abeyance pending the decision of the U.S. Supreme Court in Mitchell v. Wisconsin, U.S. Case No. 18-6210, where the issue presented is "whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the 4th Amendment warrant requirement." Oral argument in Mitchell was held April 23, 2019.

For a more complete discussion of the case law, see the Comment to Wis JI-Criminal 235.

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2663C ALCOHOL CONCENTRATION LEVEL — § 346.65(2)(g)

[ADD ONE OR MORE OF THE FOLLOWING QUESTIONS IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.][1]

If you find the defendant guilty, you must answer the following question[2] "yes" or "no":

["Did the defendant have an alcohol concentration of 0.25 or above?"]

[Answer the following question only if you answer the above question "no."]

["Did the defendant have an alcohol concentration of 0.20 or above?"]

[Answer the following question only if you answer the above question "no."]

["Did the defendant have an alcohol concentration of 0.17 or above?"]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the alcohol concentration stated in the question was proved.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2663C was originally published in 2001. This revision was approved by the Committee in December 2003.

1999 Wisconsin Act 109 created § 346.65(2)(g) which provides for increased fines for OWI offenders with three, four, or five or more priors. The increases will apply to offenses committed after the effective date: January 1, 2001. [Subsection (2)(g) was not affected by the changes made in laws relating to operating while intoxicated by 2003 Wisconsin Act 30.] The level of increase depends on the alcohol concentration level:

- 0.17 to 0.199 minimum and maximum fines are doubled
- 0.20 to 0.249 minimum and maximum fines are tripled
- 0.25 or more minimum and maximum fines are quadrupled

Because the alcohol concentration level increases the maximum fine, which is part of the criminal penalty for the offense, the Committee concluded that it is a fact which must be submitted to the jury. "Other

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than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)

The Committee recommends handling the penalty-increasing factors by submitting an additional question after the instruction on the operating under the influence or operating with a prohibited alcohol concentration offense is given.

The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of (describe offense), as defined in § 346.63___, Wis. Stats., at the time and place charged in the complaint.

If you find the defendant guilty, answer the following question(s) "yes" or "no":

Did the defendant have an alcohol concentration of ____ or above?

[ADD QUESTIONS FOR ADDITIONAL LEVELS AS REQUIRED.]

1. The Committee recommends submitting the question in the form indicated, without the upper limit of the range in the second and third questions. For example, in place of the statute's "0.17 to 0.199," the third question uses "0.17 or above." The criminal charge should indicate the level of alcohol concentration involved and it should be sufficient to ask the jury whether the applicable level is exceeded.

2. The instruction is drafted to allow for submitting one, two, or all three of the questions regarding the level of alcohol concentration. More than one question would be appropriate when reasonable, though conflicting, views of the evidence would support findings of different alcohol concentration levels.

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2663D OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT WITH A CHILD UNDER 16 YEARS OF AGE IN THE MOTOR VEHICLE — § 346.63(1)(a) and § 346.65(2)(f)1.

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant while there is a minor passenger under 16 years of age in the vehicle.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

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3. There was a minor passenger under 16 years of age in the vehicle.

Knowledge of the passenger's age is not required and mistake regarding the passenger's age is not a defense.[7]

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[8]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[9]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[10]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[11] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S

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POSITION ON THE "BLOOD-ALCOHOL CURVE,"[12] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2663D was approved by the Committee in June 2010.

This instruction is drafted for first offense OWI violations that are criminal because there was a minor passenger under 16 years of age in the vehicle. See § 346.65(2)(f)1., created by 2009 Wisconsin Act 100. Because the presence of the minor passenger makes conduct criminal that would otherwise be a forfeiture, the Committee concluded that it becomes an element of the crime.

This instruction is based on a violation for operating under the influence. For violations involving a prohibited alcohol concentration, combine Wis JI-Criminal 2660 with this instruction. For violations involving a controlled substance, combine Wis JI-Criminal 2664 with this instruction. For offenses involving drugs, combine Wis JI-Criminal 2666 with this instruction. For offenses involving the combination of alcohol and a controlled substance, combine Wis JI-Criminal 2664A with this instruction. For offenses involving a detectable amount of a restricted controlled substance, combine Wis JI-Criminal 2664B with this instruction.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.22(6) and 939.43(2).

8. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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10. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

11. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the "blood alcohol curve," see Wis JI-Criminal JI 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2664 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE — CRIMINAL OFFENSE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[2] on a highway.[3]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant was under the influence of _(name controlled substance)_[6] at the time the defendant (drove) (operated) a motor vehicle.

[_(Name controlled substance)_ is a controlled substance.][7]

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The Definition of "Under the Influence"

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a controlled substance.[8]

[Not every person who has consumed _(name controlled substance)_ is "under the influence" as that term is used here.][9] What must be established is that the person has consumed a sufficient amount of _(name controlled substance)_ to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2664 was originally published in 1979 and revised in 1982, 1986, and 1993. This revision was approved by the Committee in August 2003.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals 2 . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

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First violations of the statute are forfeitures. See Wis JI-Criminal 2664A for an instruction for a forfeiture offense involving operating while under the influence of a combination of an intoxicant and a controlled substance.

For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee suggests that the name of the controlled substance, if known, be used throughout the instruction. Section 340.01(9m) provides that for purpose of the Vehicle Code, "controlled substance" has the meaning specified in § 961.01(4), which provides: "'Controlled substance' means a drug, substance or immediate precursor included in schedules I to V of sub. II." The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.

7. The Committee concluded that it adds clarity to refer to the name of the alleged substance, if known. See note 6, supra. Whether the defendant was actually under the influence of the substance named remains a jury question.

8. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

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2664A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A COMBINATION OF AN INTOXICANT AND A CONTROLLED SUBSTANCE — CIVIL FORFEITURE — § 346.63(1)(a)

Statutory Definition of the Offense

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a combination of an intoxicant and a controlled substance.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[2] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of a combination of an intoxicant and (name controlled substance)[7] at the time the defendant (drove) (operated) a motor vehicle.

   [(Name controlled substance) is a controlled substance.][8]

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The Definition of "Under the Influence"

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and a controlled substance.[9]

[Not every person who has consumed alcoholic beverages and controlled substances is "under the influence" as that term is used here.][10] What must be established is that the person has consumed a sufficient amount of alcohol or of a controlled substance or both to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, ADD THE FOLLOWING.[11]

[The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time the test was taken may be considered by you

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in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concentration test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2664A was originally published in 1986 and revised in 1993 and 2004. This revision was approved by the Committee in October 2005.

This instruction is for a first offense under § 346.63(1)(a), involving the combined influence of an intoxicant a controlled substance. For offenses involving operating under the influence of a controlled substance alone, see Wis JI-Criminal 2664. For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and controlled substances or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

> If liquor shares its influence with another influence and is still the activating cause of the condition which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where an intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. The Committee suggests that the name of the controlled substance, if known, be used throughout the instruction. Section 340.01(9m) provides that for purpose of the Vehicle Code, "controlled substance" has the meaning specified in § 961.01(4), which provides: "'Controlled substance' means a drug, substance or immediate precursor included in schedules I to V of sub. II." The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.

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8. The Committee concluded that it adds clarity to refer to the name of the alleged substance, if known. See note 6, supra. Whether the defendant was actually under the combined influence of an intoxicant and the substance named remains a jury question.

9. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

11. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect."

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2664B OPERATING A MOTOR VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 346.63(1)(am)

Statutory Definition of the Crime

Section 346.63(1)(am) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while the person has a detectable amount of a restricted controlled substance in his or her blood.

Burden of Proof

Before you may find the defendant guilty of this offense, the [(identify prosecuting agency) [2]] [State] must prove by evidence which satisfies you [to a reasonable certainty by evidence which is clear, satisfactory, and convincing] [beyond a reasonable doubt][3] that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant (drove) (operated) a motor vehicle.

   [(Name restricted controlled substance) is a restricted controlled substance.][8]

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How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the (driving) (operating).[9]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt) that there was a detectable amount of a restricted controlled substance in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of a restricted controlled substance in (his) (her) blood at the time of the (driving) (operating) but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of a restricted controlled substance in (his) (her) blood at the time of the alleged (driving) (operating) unless you are satisfied of that fact (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt).]

Jury's Decision

If you are satisfied [to a reasonable certainty by evidence which is clear, satisfactory, and convincing] [beyond a reasonable doubt] that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2664B was originally published in 2004 and revised in 2005, 2006., and 2007 This revision made nonsubstantive editorial corrections and was approved by the Committee in June 2010.

This instruction is for a violation of § 346.63(1)(am), which was created by 2003 Wisconsin Act 97. Subsection (1)(am) provides that no person may drive or operate a motor vehicle while "[t]he person has a detectable amount of a restricted controlled substance in his or her blood." The statute applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

The penalties for this offense are the same as those for operating under the influence offenses: a first offense is a civil forfeiture; second and subsequent violations are criminal. The instruction is drafted for both types of cases with the different burdens of proof in brackets; the applicable alternative should be selected.

Section 346.63(1)(d) recognizes a defense for cases involving "a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol" that applies if the person proves that he or she had a valid prescription for the substance.

This instruction can also be used as a model for violations of other statutes that have been amended to prohibit operating with a "detectable amount . . ." See Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

The Wisconsin Court of Appeals has found the "detectable amount" provision to be constitutional. See State v. Smet, 2005 WI App 263, 288 Wis.2d 525, 709 N.W.2d 474; and, State v. Gardner, 2006 WI App 92, 292 Wis.2d 682, 715 N.W.2d 720. Also see, Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

See Wis JI-Criminal 2664 and 2664A for instructions involving operating while under the influence of a controlled substance and a combination of an intoxicant and a controlled substance. For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. They are cross-referenced by section number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

3. This instruction is drafted to be used for both civil forfeiture and criminal offenses. Use the first bracketed phrase for civil forfeitures and the second for crimes.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

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5. Regarding the definition of "highway," see Wis JI-Criminal 2600 Introductory Comment, Sec. I.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a restricted controlled substance in his or her blood remains a jury question. Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta-9-tetrahydrocannabinol.

9. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference — admissibility — the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the

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third difference — connection with the time of driving — the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.

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2665 OPERATING A VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT AND CAUSING INJURY — § 346.63(2)(a)1.

Statutory Definition of the Crime

Section 346.63(2)(a) of the Wisconsin Statutes is violated by one who causes injury to another by the operation of a vehicle[1] on a highway[2] while under the influence of an intoxicant.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle[4] on a highway.[5]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[6]

2. The defendant's operation of a vehicle caused injury[7] to (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[8] in producing the injury.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

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Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[10]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[11]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

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[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 346.63(2)(b), USE THE FOLLOWING CLOSING:[15]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 346.63(2)(b), USE THE FOLLOWING CLOSING:[16]

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the injury would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[17] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[18]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[19] does not by itself provide a defense to the crime charged against the defendant.[20] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the injury would have occurred even if the defendant had not been under the influence of an intoxicant.]

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Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[21]]

COMMENT

Wis JI-Criminal JI-Criminal 2665 was originally published in 1978 and revised in 1980, 1982, 1986, 1993, 2004, 2006, 2009, and 2015. This revision was approved by the Committee in August 2017; it added footnote 7.

This instruction is drafted for violations of § 346.63(2)(a)1., which prohibits causing injury by the operation of a vehicle while under the influence. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 2661 for the related offense of causing injury while having a prohibited alcohol concentration, as defined in § 346.63(2)(a)2. For cases involving two charges — operating under the influence and with a PAC — Wis JI-Criminal 1189 can be used as a model.

Section 346.63(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she . . . had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 16 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 2662, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

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The penalty for violations of § 346.62(2)(a) doubles if a child was in the vehicle at the time of the offense. See § 346.65(3m) and Wis JI-Criminal 999. A similar provision in the Criminal Code was repealed by 2001 Wisconsin Act 109 and recreated as a sentencing factor, but § 346.65(3m) was not affected.

In State v. Smits, 2001 WI App 45, 241 Wis.2d 374, 626 N.W.2d 42, the court held that operating while intoxicated offenses are not lesser included offenses of the "causing injury" offenses defined in § 346.63(2).

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions

1. Note that § 346.63(2)(a) uses the phrase "operation of a vehicle." This differs in two respects from the way other offenses under § 346.63 are defined. First, it refers to "operate," not "drive or operate." Second, it refers to "vehicle" not "motor vehicle." The Committee assumed that these differences were intentional on the part of the legislature. The use of "vehicle" may be justified by the fact that offenses involving injury are considered to be more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct — namely, the operation of devices which do not fall within the definition of "motor vehicle." As to the use of "vehicle," this rationale was cited with approval in State v. Smits, 2001 WI App 45, ¶16, 241 Wis.2d 374, 626 N.W.2d 42.

2. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

3. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

4. See note 1, supra. Section 340.01(74) defines "vehicle" as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

6. Regarding the definition of "operate," see § 346.63(3)(b) and Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. "Injury" was undefined by statute until 2013 Wisconsin Act 224 [effective date: April 10, 2014] created § 346.63(2)(c) to define it as "substantial bodily harm," cross-referencing the definition of that term in § 939.22(38). Section 346.63(2)(c) was repealed by 2015 Wisconsin Act 371 [effective date: April 27, 2016], again leaving "injury" undefined. The version of this instruction published before the 2014 statutory change did not define injury, but included the footnote that follows. There have been no directly applicable developments since then.

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The instruction does not define "injury" because it is not defined in the statutes or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, regarding whether "pain" is sufficient to constitute "injury." In a prosecution under § 346.63(2)(a), the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] However, in a prosecution under § 940.225(2)(b), where "injury" is also used, the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm." [Originally published as footnote 8, Wis JI-Criminal 2665 © 2009.

8. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of injury. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 15, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of injury as required by the second element. If the defendant's operation caused the injury, the defense allows the defendant to avoid liability if it is established that the injury would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element of § 940.09 and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

9. The instruction is drafted for cases involving the influence of an intoxicant. See note 3, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. It may be that cases will be charged under § 346.63(2)(a)1. where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

15. Section 346.63(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

16. See note 15, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

17. Section 346.65(2)(b) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

18. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

20. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 346.63(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 18, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

21. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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2666 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A DRUG — CRIMINAL OFFENSE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a drug to a degree which renders him or her incapable of safely driving.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[2] on a highway.[3]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant was under the influence of (name drug)[6] to a degree which renders him or her incapable of safely driving at the time the defendant (drove) (operated) a motor vehicle.[7]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2666 was originally published in 1985 and revised in 1993. This revision was approved by the Committee in August 2003.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals 2 . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

First violations of the statute are forfeitures. There is no uniform instruction for the forfeiture violation of this offense. See Wis JI-Criminal 2664A for an instruction for a forfeiture offense involving operating while under the influence of a combination of an intoxicant and a controlled substance. See Wis JI-Criminal 2664 for an instruction for a criminal offense involving operating while under the influence of a controlled substance.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of JI 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

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6. This instruction assumes that the identity of the drug is known. If the identity of the drug is not known, proving that a drug is involved may be extremely difficult in light of the statutory definition of "drug" that applies. Section 340.01(15mm) provides that the applicable definition is the one found in § 450.01(10), which reads as follows:

> "Drug" means:
>
> (a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;
>
> (b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or other animals;
>
> (c) Any substance other than a device or food intended to affect the structure or any function of the body of persons or other animals; or
>
> (d) Any substance intended for use as a component of any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

Some of the difficulty of incorporating the "drug" definition into an instruction might be avoided by charging the case as one involving "under the influence of an intoxicant." If the intoxicant shares its influence with another substance, the person may still be considered to be "under the influence of an intoxicant." Waukesha v. Godfrey, 41 Wis. 2d 401, 406, 164 N.W.2d 314 (1965).

7. The statute requires not only operating while "under the influence" but also that the defendant be under the influence "to a degree which renders him or her incapable of safely driving." The "incapable of safely driving" requirement appears to be more restrictive than the "ability to operate is impaired" standard that is part of the uniform definition of "under the influence." See, for example, Wis JI-Criminal 2663. Since this requirement of the statute supersedes the usual "under the influence" definition, no definition is included in the instruction.

See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

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2666A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ANY COMBINATION OF AN INTOXICANT AND ANY OTHER DRUG TO A DEGREE THAT RENDERS HIM OR HER INCAPABLE OF SAFELY DRIVING – § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[2] on a highway.[3]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant was under the combined influence of an intoxicant and (name of drug)[6] to a degree which rendered (him) (her) incapable of safely driving at the time the defendant (drove) (operated) a motor vehicle.[7]

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[(Name of drug) is a drug.][8]

Definition of "Under the Influence"

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and any other drug.[9]

[Not every person who has consumed alcoholic beverages and any other drug is "under the influence" as that term is used here.][10] What must be established is that the person has consumed a sufficient amount of alcohol or of any other drug or both to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, ADD THE FOLLOWING.[11]

[The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol

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in 210 liters of the defendant's breath] at the time the test was taken may be considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concertation test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2666A was approved by the Committee in 2019.

This instruction is for a criminal offense under § 346.63(1)(a), involving the combined influence of an intoxicant and any other drug. For offenses involving operating under the influence of a drug alone, see Wis JI-Criminal 2666. For offenses involving operating under the influence of a controlled substance, see Wis JI-Criminal 2664.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and a controlled substance or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

> If liquor shares the influence with another influence and is still the activating cause of the condition which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where the intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee suggests that the name of the drug, if known, be used throughout the instruction. Section 340.01(15mm) provides that for the purpose of the Vehicle Code, "drug" has the meaning specific in § 450.01(10).

This instruction assumes that the identity of the drug is known. If the identity of the drug is not known, proving that a drug is involved may be extremely difficult in light of the statutory definition of "drug" that applies. Section 340.01(15mm) provides that the applicable definition is the one found in § 450.01(10), which reads as follows:

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"Drug" means:

(a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;

(b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or animals;

(c) Any substance other than a device or food intended to affect the structure or any function of the body or persons or other animals; or

(d) Any substance intended for use as a component if any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

7. The statute requires not only operating while "under the influence" but also that the defendant be under the influence "to a degree which renders him or her incapable of safely driving." The "incapable of safely driving" requirement appears to be more restrictive than the "ability to operate is impaired" standard that is part of the uniform definition of "under the influence." See, for example, Wis JI-Criminal 2663. Since this requirement of the statute supersedes the usual "under the influence" definition, no definition is included in the instruction.

See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. The Committee concluded that it adds clarity to refer to the name of the alleged drug, if known. See note 6, supra. Whether the defendant was actually under the combined influence of an intoxicant and the drug named remains a jury question.

9. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of a drugs which are roughly similar in their effect on a person as alcohol. That is, a person could use some drug in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some drugs, however, have such extreme effects that the sentence in brackets should not be used.

11. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect."

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2667 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT: HAZARDOUS INHALANT — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a hazardous inhalant.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of a hazardous inhalant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Hazardous Inhalant"

"Hazardous inhalant" means a substance that is ingested, inhaled, or otherwise introduced into the human body in a manner that is not intended by the manufacturer of the substance, and that is intended to induce intoxication or elation.[7]

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Definition of "Under the Influence of a Hazardous Inhalant"

"Under the influence of a hazardous inhalant" means that the defendant's ability to operate a vehicle was impaired because the defendant ingested, inhaled, or otherwise introduced a hazardous inhalant into (his) (her) body.[8]

Not every person who has introduced a hazardous inhalant into (his) (her) body[9] is "under the influence" as that term is used here. What must be established is that the person has introduced a sufficient amount of a hazardous inhalant into (his) (her) body to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2667 was approved by the Committee in June 2014.

This instruction is drafted for a criminal operating under the influence offense where the intoxicant involved is a hazardous inhalant. 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] created § 340.01(25d), which provides: "'Intoxicant' includes a hazardous inhalant." Act 83 also created § 340.01(20r), which defines "hazardous inhalant."

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1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant, where the intoxicant is a hazardous inhalant. The basic offense definition in § 346.63(1)(a) refers to "operating under the influence of an intoxicant." 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] created § 340.01(25d), which provides: "'Intoxicant' includes a hazardous inhalant."

Act 83 also created § 340.01(20r), which defines "hazardous inhalant" as follows:

> "Hazardous inhalant" means a substance that is ingested, inhaled, or otherwise introduced into the human body in a manner that does not comply with any cautionary labeling that is required for the substance under s. 100.37 or under federal law, or in a manner that is not intended by the manufacturer of the substance, and that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. This is based on the definition of "hazardous inhalant" provided in § 340.01(20r). The Committee concluded that the phrase "in a manner not intended by the manufacturer" would be likely to apply to most cases. If the facts require, substitute "in a manner that does not comply with any cautionary labeling that is required for the substance under s. 100.37 or under federal law." The Committee also concluded that the phrase "is intended to induce intoxication or elation" would be sufficient to cover most cases. If the facts require, substitute "intended to stupefy the central nervous system" or "intended to change the human audio, visual, or mental processes."

8. This sentence adapts the standard definition of "under the influence" of an alcohol beverage for use in "hazardous inhalant" cases. For a discussion of issues relating to defining "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. The instructions uses the phrase "introduced . . . into the body" as a simpler statement than the full statutory phrase: "ingest, inhale, or otherwise introduce . . ." "Introduce" includes "ingest" and "inhale."

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2668 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CIVIL FORFEITURE — §§ 346.63(1)(a) and 346.63(1)(b)

Description of the Charges

The first citation in this case charges that the defendant drove or operated a motor vehicle on a highway while under the influence of an intoxicant in violation of § 346.63(1)(a) of the Wisconsin Statutes.

The second citation in this case charges that the defendant drove or operated a motor vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 346.63(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the (identify prosecuting agency [1] must prove every element of each offense charged to a reasonable certainty by evidence which is clear, satisfactory, and convincing.[2]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[3]

Each citation charges a separate offense, and you must consider each one separately.

Definition of Citation 1 — Operating Under The Influence

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway while under the influence of an intoxicant.[4]

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Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency) must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of Citation 1 — Operating Under The Influence

1. The defendant (drove) (operated) a motor vehicle[5] on a highway.[6]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][7]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][8]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

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It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Definition of Citation 2 — Operating With A Prohibited Alcohol Concentration

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway with a prohibited alcohol concentration.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of Citation 2 — Prohibited Alcohol Concentration

1. The defendant (drove) (operated) a motor vehicle on a highway.
2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

"Prohibited alcohol concentration" means[10]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[11] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S

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POSITION ON THE "BLOOD-ALCOHOL CURVE,"[12] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify prosecuting agency is not required to prove the underlying scientific reliability of the method used by the testing device. However, the (identify prosecuting agency is required to establish that the

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testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant (drove) (operated) a motor vehicle on a highway while under the influence of an intoxicant, you should find the defendant guilty of the offense charged in Citation 1.

If you are not so satisfied, you must find the defendant not guilty of the offense charged in Citation 1.

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant (drove) (operated) a motor vehicle on a highway while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of the offense charged in Citation 2.

If you are not so satisfied, you must find the defendant not guilty of the offense charged in Citation 2.

COMMENT

Wis JI-Criminal 2668 was originally published in 1986 and revised in 1993, 2003 and 2005. This revision was approved by the Committee in December 2014; it deleted material relating to finding that the alcohol concentration was more than 0.10, a fact that formerly made a difference in applicable fees and costs.

The 2003 revision reflected the change in the prohibited alcohol concentration [PAC] level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

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This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of 346.63(1)(a); and, one alleging operating with a prohibited alcohol concentration of 0.08 or more. It is a combination of Wis JI-Criminal 2660A and 2663A and is intended to implement the procedure set forth in § 346.63(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is for a first offense under § 346.63(1)(a) and (b), which are punished as forfeitures. For a combined instruction for criminal violations, see Wis JI-Criminal 2669.

The constitutionality of the two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts, adapted for a forfeiture case. If the equivalent of Wis JI-Criminal 115 is also given, the statement need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . , adapted for a forfeiture case. If the equivalent of Wis JI-Criminal 484 is also given, the statement need not be repeated here.

4. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

5. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

6. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

7. This is the definition of "drive" provided in § 346.63(3)(a).

8. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

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9. The instruction is drafted for cases involving the influence of an intoxicant. See note 4, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

11. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, sec. VII.

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2669 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CRIMINAL CHARGE — §§ 346.63(1)(a) and 346.63(1)(b)

NOT RECOMMENDED FOR USE FOR CASES INVOLVING A CHARGE OF A PAC OF MORE THAN 0.02[1]

Description of the Charges

The first count in the criminal complaint charges that the defendant drove or operated a motor vehicle on a highway while under the influence of an intoxicant in violation of § 346.63(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant drove or operated a motor vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 346.63(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.[2]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[3]

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 — Operating Under The Influence

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway while under the influence of an intoxicant.[4]

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State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of Count 1 — Operating Under The Influence

1. The defendant (drove) (operated) a motor vehicle[5] on a highway.[6]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][7]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][8]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

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It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Definition of Count 2 — Operating With A Prohibited Alcohol Concentration

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following two elements were present.

Elements of Count 2 — Prohibited Alcohol Concentration

1. The defendant (drove) (operated) a motor vehicle on a highway.
2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

"Prohibited alcohol concentration" means[10]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[11]

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WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant (drove) (operated) a motor vehicle on a highway while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant (drove) (operated) a motor vehicle on a highway while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.

COMMENT

Wis JI-Criminal 2669 was originally published in 1989 and revised in 1992, 1995, 2004, and 2006. This revision was approved by the Committee in July 2014; it added a recommendation for cases involving a PAC of more than 0.02.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of 346.63(1)(a); and, one alleging operating with a prohibited alcohol concentration of 0.08 or more. It is a combination of Wis JI-Criminal 2660 and 2663 and is intended to implement the procedure set forth in § 346.63(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is drafted for criminal charges; for two civil forfeiture offenses, see Wis JI-Criminal 2668.

The constitutionality of the two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the

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express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. A two-count case could involve the combination of an under-the-influence charge with a charge of operating with a PAC of more than 0.02. The Committee recommends that a combined instruction not be given for that kind of case, because the standard paragraphs on the evidentiary effect of test results could be confusing. Rather, Wis JI-Criminal 2663 Operating Under The Influence should be used for the under-the-influence count; Wis JI-Criminal 2660C Operating With A Prohibited Alcohol Concentration — More Than 0.02 Grams should be used for the 0.02 count. Those instructions will have references to the test results that are appropriate for each offense. The instructions should identify the charges as "Count One" and "Count Two" as reflected in the charging document.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal is also given, the statement need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the statement need not be repeated here.

4. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

5. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

6. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

7. This is the definition of "drive" provided in § 346.63(3)(a).

8. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

9. The instruction is drafted for cases involving the influence of an intoxicant. See note 3, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

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10. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2670 FAILURE TO GIVE INFORMATION OR RENDER AID FOLLOWING AN ACCIDENT — § 346.67

Statutory Definition of the Crime

Section 346.67 of the Wisconsin Statutes is violated when the operator of any vehicle involved in an accident on a highway[1] fails to reasonably investigate what was struck and if the operator knows or has reason to know that the accident resulted in (injury to a person) (death of a person) (damage to a vehicle driven or attended by a person) fails to stop the vehicle he or she is operating as close to the scene of the accident as possible and remain at the scene of the accident until the operator has given information (and rendered reasonable assistance to any person injured in the accident).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle involved in an accident[2] on a highway.[3]

   A vehicle[4] is operated when it is set in motion.[5]

2. The defendant knew that the vehicle (he) (she) operated was involved in an accident on a highway.[6]

3. The defendant violated a duty after being involved in an accident. A driver who is involved in an accident has two duties.[7]

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The State is required to satisfy you beyond a reasonable doubt that the defendant violated at least one of the two duties but you are not required to agree as to which duty was violated.

The first duty is to reasonably investigate what was struck.

The second duty is that a driver involved in an accident involving a person or an attended vehicle must stop and provide information and render aid. To prove a violation of this duty, the State must prove the following beyond a reasonable doubt:

• that the defendant knew or had reason to know that the vehicle (he) (she) was operating was involved in an accident involving (a person) (an attended vehicle) and that the accident resulted in (injury[8] to a person) (death of a person) (damage to a vehicle driven or attended by a person); and,

• that the defendant did not immediately stop (his) (her) vehicle as close to the scene of the accident as possible and remain at the scene until (he) (she) had done all the following:

(a) Gave (his) (her) name, address, and the registration number of the vehicle (he) (she) was driving to (the person struck) (the operator or occupant of or person attending any vehicle collided with);[9] and

(b) If it was requested and was available, exhibited (his) (her) operator's license to (the person struck) (the operator or occupant of or person attending any vehicle collided with)[; and[10]

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(c) Rendered reasonable assistance to any person[11] injured in the accident including the transporting or making arrangements to transport the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that medical or surgical treatment is necessary or is requested by the injured person].

4. The defendant was physically capable of complying with these requirements.[12]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE OF THE MORE SERIOUS OFFENSES IDENTIFIED IN SEC. 346.74(5)(b),(c), OR (d) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACT INCREASING THE PENALTY WAS PRESENT:[13]

[If you find the defendant guilty, you must answer the following question(s):

("Did the accident involve injury to a person?")[14]

(Did the accident involve injury to a person and did the person suffer great bodily harm?"

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"Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.)[15]

("Did the accident involve death to a person?")[16]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."]

COMMENT

Wis JI-Criminal 2670 was originally published in 1969 and revised in 1979, 1980, 1982, 1983, 1985, 1993, 1994, 2003, 2004, 2008, 2009, and 2014. This revision was approved by the Committee in June 2018; it reflects changes made to § 346.67 by 2015 Wisconsin Act 319 [effective date: April 1, 2016].

The Committee concluded that § 346.67, as amended by 2015 Wisconsin Act 319, defines two ways to violate the statute. First, the offense is committed by one who is involved in an accident and fails to reasonably investigate. Second, the offense is committed by one who may have reasonably investigated but failed to fulfill other duties imposed by the statute. The instruction addresses this by requiring in the third element that the "defendant violated a duty" and specifying the nature of the two duties that may be involved.

Section 346.74(5), which provides the penalties for violations of § 346.67, was amended by 2003 Wisconsin Act 74 to read as follows:

346.74(5) Any person violating any provision of s. 346.67(1):

(a) Shall be fined not less than $300 nor more than $1,000 or imprisoned not more than 6 months or both if the accident did not involve death or injury to a person.
(b) May be fined not more than $10,000 or imprisoned for not more than 9 months or both if the accident involved injury to a person but the person did not suffer great bodily harm.
(c) Is guilty of a Class E felony if the accident involved injury to a person and the person suffered great bodily harm.
(d) Is guilty of a Class D felony if the accident involved death to a person.
(e) Is guilty of a felony if the accident involved death or injury to a person.

Act 74 increased the penalties in subs. (c) and (d); the effective date is November 27, 2003.

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Wis JI-Criminal 2670 is designed to be used for offenses involving any of the penalties. If the base penalty under sub. (5)(a) is involved, no additional questions need be asked. The facts specified in subs. (5)(b)-(d) that increase the penalty are to be handled by submitting extra questions to the jury. See the text of the instruction at note 13. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of failure to stop and give information or render aid at the scene of an accident under Wis. Stat. § 346.04, at the time and place charged in the [complaint] [information].

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question 'yes' or 'no.'"

[Add the appropriate question.]"

The nature of this offense is discussed in two decisions which focused on the sufficiency of the charging document. See State v. Lloyd, 104 Wis.2d 49, 310 N.W.2d 617 (Ct. App. 1981), and State v. Mann, 123 Wis.2d 375, 367 N.W.2d 209 (1985) [reversing 120 Wis.2d 629, 357 N.W.2d 9 (Ct. App. 1984)]. Also see State v. Mann, 135 Wis.2d 420, 400 N.W.2d 489 (Ct. App. 1986), which discusses the meaning of "attended" and finds that the term "reasonable assistance" is not impermissibly vague.

In State v. Hartnek, 146 Wis.2d 188, 430 N.W.2d 361 (Ct. App. 1988), the court held that a single event of failing to stop and render aid following an accident may give rise to multiple charges under § 346.67 when there are multiple victims. The supreme court declined the defendant's request to overrule Hartnek in State v. Pal, 2017 WI 44, 374 Wis.2d 759, 893 N.W.2d 848, concluding that "the legislature authorized the State to charge multiple counts of the offense of hit and run resulting in death in cases involving multiple victims." ¶28.

The reporting requirement of § 346.67 does not infringe a person's Fifth Amendment privilege against self-incrimination. State v. Harmon, 2006 WI App 214 ¶29, 296 Wis.2d 861, 723 N.W.2d 732. Also see, California v. Byers, 420 U.S. 426 (1971).

1. Section 346.66 provides that § 346.67 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public . . . ," the instruction must be modified.

See Wis JI-Criminal 2600 Operating While Intoxicated Introductory Comment Sec. I, for discussion of the "on a highway" element.

2. "'Accident' in § 346.67(1) means 'an unexpected, undesirable event' and may encompass intentional conduct." State v. Harmon, 2006 WI App 214 ¶1, 296 Wis.2d 861, 723 N.W.2d 732. Thus, the statute applies to a case where one view of the facts was that the defendant intentionally ran over the victim.

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3. The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element.

"Highway" is defined by § 340.01(22). Also see Wis JI-Criminal 2600 Introductory Comment Sec. I, for discussion of the "on a highway" element.

The statute applies to a case where the defendant lost control of the vehicle and crashed into a house. "Because Dartez's loss of control of the vehicle occurred on the highway, even though the resulting collision occurred off the highway, we conclude she was 'involved in an accident' 'upon a highway' within the meaning of § 346.67(1). . ." State v. Dartez, 2007 WI App 126 ¶2, 301 Wis.2d 499, 731 N.W.2d 340.

2009 Wisconsin Act 62 [effective date: March 1, 2010] created § 346.66(2) to read as follows:

> Sections 346.67, 346.68, and 346.69 apply to the operator of a vehicle that, whether by operator intention or lack of control, departs a highway or premises described in sub. (1)(a) immediately prior to an accident if the accident does not occur on real property owned or leased by the operator.

4. Section 340.01(74) defines "vehicle."

Section 346.66 provides that § 346.67 does "not apply to accidents involving only snowmobiles, all terrain vehicles, or vehicles propelled by human power or drawn by animals."

5. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

For purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion."

See Wis JI-Criminal 2600 Operating While Intoxicated Introductory Comment Sec. III, for discussion of the "operating" element.

6. Wis JI-Criminal 2670 was originally published in 1969 and had an element requiring that "the defendant knew that he had been involved in accident which resulted in (injury to) (death of) any person" or "damage to a vehicle . . ." The element was reviewed many times and eventually revised to require that the "defendant knew that the vehicle he was operating was involved in an accident ..." Two published court of appeals decisions supported the conclusion. In State v. Hartnek, 146 Wis.2d 188, 195, 430 N.W.2d 361 (Ct. App. 1988), the court stated:

> . . . Hartnek argues that sec. 346.67 does not require proof of scienter; therefore, it should be strictly construed so as not to authorize severe criminal penalties under [Collova]. However, as the state correctly notes, the standard jury instruction requires a finding that the defendant knew

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he or she had struck a person or an attended vehicle. Wis JI-Criminal 2670, *approved in* State v. Mann, 135 Wis.2d 420, 426, 400 N.W.2d 489, 491-92 (Ct. App. 1986). We therefore do not find Hartnek's argument particularly persuasive in this regard.

State v. Mann did state that "[t]he instruction [JI 2670] fairly and adequately informs the jury of the elements of the offense" but it did not focus on any particular part of the instruction or element of the crime.

The knowledge requirement was changed again in 2014 to read: "This requires that the defendant knew the accident involved (a person) (an attended vehicle) before (he) (she) left the scene of the accident." The second sentence was added after the Committee reviewed State v. Sperber, an unpublished Court of Appeals decision [No. 2013AP358-CR, Oct. 15, 2013]. Sperber involved a driver who struck a person in a wheelchair and drove off without stopping. The driver claimed he did not know he struck a person; he thought it was a garbage can. At trial, the jury asked about when the defendant's knowledge must exist: ". . . does the defendant have to be aware that he hit a person at the time of the accident or in the days following the incident in order to fulfill the requirements of the second item?" The trial judge referred the jury to the instruction and did not directly answer the question. Three hours later, the jury asked a similar question and was told to "Read 2670 in its entirety." Sperber was convicted and alleged on appeal that defense counsel was ineffective for failing to request that the jury be instructed that knowledge was to be considered as of the time he departed the accident scene. The court of appeals agreed and, also concluding that the real controversy was not fully tried, reversed the conviction. The Committee found Sperber persuasive and decided that a specific statement should be added to the instruction to clarify that knowledge that the accident involved a person or attended vehicle must exist before the defendant left the scene.

The changes in § 367.67 made by 2015 Wisconsin Act 319 are believed to be in reaction to the Sperber decision, with the focus being on eliminating the requirement of knowledge that the accident involved a person or attended vehicle. See sec. 346.67(3) which provides: "A prosecutor is not required to allege or prove that an operator knew that he or she collided with a person or a vehicle driven or attended by a person in a prosecution under this section." {Emphasis added.} The Committee concluded that only a limited knowledge requirement remains – knowledge that the person was involved in an accident. This is consistent with one of the basic requirements of omission liability: knowledge of facts giving rise to the duty. See Wis JI-Criminal 905 Liability For Failure To Act: Criminal Omissions. Liability for violating § 367.67 is in essence liability for an omission – failure to fulfill a legal duty imposed as a result of being involved in an accident.

7. The third element reflects the Committee's conclusion that § 346.67, as amended by 2015 Wisconsin Act 319, creates two duties, violation of either of which can be the basis for a conviction. First, the offense is committed by one who is involved in an accident and fails to reasonably investigate. Second, the offense is committed by one who may have reasonably investigated but failed to fulfill other duties imposed by the statute. The instruction addresses this by requiring in the third element that the "defendant violated a duty" and specifying the nature of the two duties that may be involved.

8. The instruction does not define "injury" because it is not defined in the statutes or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether "pain" is sufficient to constitute "injury." In a prosecution under § 346.63(2)(a), the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] However, in a prosecution under

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§ 940.225(2)(b), where "injury" is also used, the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] Neither of these decisions may cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm."

9. "§ 346.67(1) requires an operator of a vehicle to identify him or herself as the operator of the vehicle." State v. Wuteska, 2007 WI App 157 ¶1, 303 Wis.2d 646, 795 N.W.2d 574. Wuteska involved a driver who provided the information required but did not identify herself as the driver of the vehicle. The court of appeals reversed the dismissal of the complaint. In a Wuteska-type situation, element 3. should be modified to address the issue directly.

10. The paragraph in brackets, preceded by "(c)," should be given when there is evidence that a person was injured in the accident. The statute does cover cases where there has been no personal injury — those involving "damage to a vehicle which is driven or attended by any person." § 346.67(1).

11. The duty to stop and render aid applies even though the only other "person injured" in the accident died at the scene. State v. Swatek, 178 Wis.2d 1, 7-8, 502 N.W.2d 909 (Ct. App. 1993): "Thus, the duty under sec. 346.67(1)(c), Stats., does not turn on whether a person's injuries are immediately fatal, but on whether the operator rendered that amount of assistance which an ordinary, reasonable person would render under the same or similar circumstances. We also conclude that whether an operator has fulfilled this duty will, in most instances, present a question for the jury."

The reference to "any person" was discussed in State v. Lloyd, 104 Wis.2d 49, 310 N.W.2d 617 (Ct. App. 1981). The defendant in Lloyd argued that the reference meant he had fulfilled his duty under the statute by rendering aid to one of several persons injured in the accident. The court rejected this interpretation, holding that "any" does not mean "at least one." (The court's discussion suggests that what is meant by "any" is really "any and all" persons injured.) 104 Wis.2d 49, 62-63.

The extent of the duty to render aid was discussed in State v. Mann, 120 Wis.2d 629, 357 N.W.2d 9 (Ct. App. 1984). However, this decision was reversed by the Wisconsin Supreme Court in a decision that focused on the sufficiency of the complaint rather than the requirements of the statute. State v. Mann, 123 Wis.2d 375, 367 N.W.2d 209 (1985).

12. Section 346.67 expressly bases criminal liability on the person's omission or failure to act. The physical ability to perform the required act is a basic requirement of omission liability. See Wis JI-Criminal 905 Liability For Failure To Act: Criminal Omissions. Also see LaFave and Scott, Substantive Criminal Law, § 3.3(c) (West 1986), an earlier version of which was cited with approval in State v. Williquette, 129 Wis.2d 239, 251, 385 N.W.2d 145 (1986).

13. 2003 Wisconsin Act 74 (effective date: November 27, 2003) revised § 346.74, which identifies the penalties for violations of § 346.67. See the Comment preceding note 1, supra. The Committee concluded that the best way to handle the facts which increase the penalty is to submit a special question to the jury, asking whether the fact has been established beyond a reasonable doubt. This is the same way the question of value is handled in a theft case. See Wis JI-Criminal 1441.

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14. This question need not be added to the instruction if the "injury to any person" alternative was selected in element 3.

15. Section 346.74 does not provide a definition of "great bodily harm" but the Committee concluded that the definition in § 939.22(14) should apply. The Committee recommends defining the term in the manner used in the instruction. See Wis JI-Criminal 914 for a more complete discussion of issues relating to "great bodily harm."

16. This question need not be added to the instruction if the "death of any person" alternative was selected in element 3.

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2672 SPEEDING: EXCEEDING A REASONABLE AND PRUDENT SPEED UNDER § 346.57(2) OR AN ORDINANCE ADOPTING § 346.57(2)

Statutory Definition of the Crime

[Section 346.57(2)] [Ordinance ____, adopting § 346.57(2)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[2] at a speed greater than is reasonable and prudent under the circumstances.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a highway.[5]
2. The defendant drove the vehicle at a speed[6] greater than was reasonable and prudent under the conditions, taking into consideration the actual and potential hazards then existing.

   [This element requires that the speed of the vehicle be controlled as necessary to avoid colliding with any (object) (person) (vehicle) (other conveyance) on or entering the highway in compliance with legal requirements and using due care.]

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Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2672 was originally published in 1980 and revised in 1985, 1987, and 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities — county, city, town, etc. — the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(2) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance ___, adopting section 346.57(2) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

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3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

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2672A LAW NOTE: THE "JUSTIFICATION" DEFENSE

The Wisconsin Supreme Court has recognized that the defense of "justification" is available to excuse what would otherwise be a speeding violation. In State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982), the defendant was convicted of the civil forfeiture offense of speeding under § 346.57(4)(h). He claimed the trial court erred when it refused to submit an instruction on the defendant's claim of legal justification, that is, that his conduct was excusable on the grounds of self-defense, necessity, coercion, or entrapment. The supreme court held "that where a violation of § 346.57(4)(h) occurs, the actor may claim the defense of legal justification if the conduct of a law enforcement officer causes the actor reasonably to believe that violating the law is the only means of preventing bodily harm to the actor or another and causes the actor to violate the law." 107 Wis.2d at 56.

The court noted that the defense of justification is available even though speeding is considered to be a "strict liability" offense in the sense that a culpable state of mind is not an element of the offense. In deciding whether to extend defenses to strict liability traffic offenses, the court said it must weigh the public interest in efficient enforcement of the traffic law against other public interests which are protected by the possible defenses. The court found that "[w]here the violation of the speeding law is caused by the state itself through the actions of a law enforcement officer, . . . the public interest in allowing the violator to claim a defense outweighs the public interest in ease of prosecution." 107 Wis.2d 44 at 55.

The court made specific note that it was not deciding whether the defense of justification might be available to a defendant in a case where the alleged causative force is someone or something other than a law enforcement officer. In Brown, the defendant's testimony was that the traffic officer operated his own vehicle in such an erratic and harassing manner that the defendant felt compelled to increase his own speed in order to get away from the officer.

COMMENT

Wis JI-Criminal 2672A was originally published in 1985 as part of the Comment to Wis JI-Criminal 2676. It was republished as JI 2672A Law Note in 2009.

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2674 SPEEDING: DRIVING TOO FAST FOR CONDITIONS UNDER § 346.57(3) OR AN ORDINANCE ADOPTING § 346.57(3)

Statutory Definition of the Crime

[Section 346.57(3)] [Ordinance ____, adopting § 346.57(3)][1] of the Wisconsin Statutes, provides that no person shall drive a vehicle on a highway[2] at a speed greater than is reasonable and prudent under the circumstances and that a person shall drive at an appropriate reduced speed when

[approaching and crossing (an intersection) (a railway grade crossing).]

[approaching and going around a curve.]

[approaching a hillcrest.]

[traveling upon any narrow or winding roadway.]

[passing (school children) (highway construction or maintenance workers) (pedestrians).]

[special hazard exists with regard to other traffic or by reason of highway or weather conditions.]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following three elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a highway.[5]

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2. The defendant drove the vehicle at a speed[6] greater than was reasonable and prudent under the conditions, taking into consideration the actual and potential hazards then existing.

[This element requires that the speed of the vehicle be controlled as necessary to avoid colliding with any (object) (person) (vehicle) (other conveyance) on or entering the highway in compliance with legal requirements and using due care.]

3. The defendant failed to drive at an appropriate reduced speed when

[approaching and crossing (an intersection) (a railway grade crossing).]

[approaching and going around a curve.]

[approaching a hillcrest.]

[traveling upon any narrow or winding roadway.]

[passing (school children) (highway construction or maintenance workers) (pedestrians).]

[special hazard exists with regard to other traffic or by reason of highway or weather conditions.][7]

Appropriate reduced speed is a relative term and means less than the otherwise lawful speed. An appropriate reduced speed is that speed at which a person of ordinary intelligence and prudence would drive under the same or similar circumstances.[8]

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Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2674 was originally published in 1980 and revised in 1985, 1987, and 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities — county, city, town, etc. — the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(3) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance ___, adopting section 346.57(3) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

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3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

7. See Wis. Stat. § 346.57(3).

8. See Wis JI-Civil 1285.

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2676 SPEEDING: EXCEEDING FIXED LIMITS UNDER § 346.57(4)(e) OR AN ORDINANCE ADOPTING § 346.57(4)(e)

Statutory Definition of the Crime

[Section 346.57(4)(e)] [_____, adopting § 346.57(4)(e)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle at a speed in excess of 25 miles per hour on any highway[2] within the corporate limits of a city or village, provided that no different limit was indicated by an official traffic sign.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following four elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle.[4]
2. The defendant drove the vehicle on a highway[5] located within the (city) (village) limits of (name city or village).

   [This element further requires that the highway was not located in an outlying district of (name city or village). "Outlying district" means the territory contiguous to and including any highway within the corporate limits of a city or village where on each side of the highway within any 1,000 feet along such highway the buildings in use for business, industrial, or residential purposes fronting thereon average more than 200 feet apart.][6]

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3. The defendant drove a vehicle at a speed in excess of 25 miles per hour.[7]

4. No speed limit different than 25 miles per hour was indicated by an official traffic sign.

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that all four elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict.][8]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2676 was originally published in 1980 and revised in 1985, 1987, 1988, and 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities — county, city, town, etc. — the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(4)(e) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance ___, adopting section 346.57(4)(e) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

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The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. See § 346.57(1)(ar). The bracketed material need be included only when the location of the highway in an "outlying district" is raised by the evidence.

7. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and Comment.

8. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). Also see note 7, Wis JI-Criminal 2677 for further discussion of the required finding on speed.

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2676A SPEEDING: EXCEEDING 65 MILES PER HOUR UNDER § 346.57(4)(gm) OR AN ORDINANCE ADOPTING § 346.57(4)(gm)

Statutory Definition of the Offense

[Section 346.57(4)(gm)] [Ordinance ____, adopting § 346.57(4)(gm)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle at a speed in excess of 65 miles per hour on any freeway or expressway for which a limit of 65 miles per hour is indicated by an official traffic sign.[2]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following three elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a freeway or expressway.[5]
2. The defendant drove the vehicle at a speed in excess of 65 miles per hour.[6]
3. A speed limit of 65 miles per hour was indicated by an official traffic sign.[7]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that all three elements of this offense have been proved, you should find the

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defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict.][8]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2676A was originally published in 1988 and revised in 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Section 346.57(4)(gm), provides for the speed limit of 65 miles per hour "on any freeway or expressway."

Section 346.57(6)(b) provides:

> The limit specified under sub. (4)(gm) is not effective unless official signs giving notice of the limit have been erected by the department.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities — county, city, town, etc. — the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(4)(gm) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance ___, adopting section 346.57(4)(gm) of the Wisconsin Statutes, is violated . . ."

2. The phrase "indicated by an official traffic sign" is added to the definition of the offense because § 346.57(6)(b) provides that the 65 miles per hour limit "is not effective" unless official signs give notice. (See text of subsec. (6)(b) preceding note 1, supra. The Committee concluded that while it could be argued that proof of the posting of signs is not a fact the prosecution is required to prove, it was more efficient to add this fact to the instruction in all cases rather than use a more complicated approach that would try to treat it as an "affirmative defense."

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

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4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

"Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. "Freeway" is defined in § 346.57(1)(am); "expressway" is defined in § 346.57(1)(ag).

6. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and comment.

7. See note 2, supra.

8. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). Also see note 7, Wis JI-Criminal 2677 for further discussion of the required finding on speed.

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2677 SPEEDING: EXCEEDING 55 MILES PER HOUR IN THE ABSENCE OF POSTED LIMITS UNDER § 346.57(4)(h) OR AN ORDINANCE ADOPTING § 346.57(4)(h)

Statutory Definition of the Offense

[Section 346.57(4)(h)] [Ordinance _____, adopting § 346.57(4)(h)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[2] in excess of 55 miles per hour in the absence of any other posted limit.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a highway.[5]
2. The defendant drove the vehicle at a speed which exceeded 55 miles per hour.[6]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict].[7]

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2677 was originally published in 1987 and revised in 1988 and 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities — county, city, town, etc. — the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(4)(h) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance ___, adopting section 346.57(4)(h) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast").

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If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and comment.

7. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). A jury finding of the actual speed should also be made when suspension of operating privileges is sought under § 343.30(1n), which requires suspension for 15 days when the person has been convicted under § 346.57(4)(h) (as opposed to city or county ordinance adopting § 346.57(4)(h)) for exceeding the posted speed limit by 25 or more miles per hour.

In State v. Zick, 44 Wis.2d 546, 550, 171 N.W.2d 430 (1969), the Wisconsin Supreme Court held:

> Under this section [§ 346.57(5)] we hold the state may charge a defendant with speeding and also state the excess rate of speed and such charge maybe sustained by proof of any speed in excess of the maximum permissible speed. Although the exact rate of speed found need not conform to the rate of speed stated in the ticket it is important in determining the punishment and points and must be proved beyond a reasonable doubt.

(Although the Zick case identifies the burden of proof as "beyond a reasonable doubt," where the penalty for the offense is only a forfeiture, the proper burden is "to a reasonable certainty by evidence which is clear, satisfactory, and convincing.")

The Zick decision approved the use of a verdict which provided in part:

> We, the Jury, find the defendant, ((name of defendant)), guilty of speeding at the time and place charged in the Complaint and find the speed at which he drove was ____ miles per hour.

(Although the approved verdict in the Zick case referred to "the complaint," the proper reference would usually be to the "citation.")

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2678 SPEEDING: EXCEEDING POSTED LIMITS UNDER § 346.57(5) OR AN ORDINANCE ADOPTING § 346.57(5)

Statutory Definition of the Offense

[Section 346.57(5)] [Ordinance ____, adopting § 346.57(5)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[2] in excess of any speed limit established pursuant to law by state or local authorities and indicated by official signs.

Burden of Proof

Before you may find the defendant guilty of this offense, the _(identify prosecuting agency)_[3] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following three elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a highway.[5]
2. The defendant drove the vehicle at a speed which exceeded the speed limit established by law.[6]
3. The established speed limit was indicated by official signs.

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that all three elements of this offense have been proved, you should find the

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defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict].[7]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2678 was originally published in 1980 and revised in 1985, 1987, 1988, and 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities — county, city, town, etc. — the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(5) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance ___, adopting section 346.57(5) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

"Vehicle" means every device in, upon or by which any person or property is or may be transported

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or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

7. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See note 7, Wis JI-Criminal 2677, for further discussion of the required finding of speed and a suggested form of verdict.

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2679 RADAR SPEED MEASUREMENT

This court recognizes that the speed measurement device used in this case uses a scientifically sound method of measuring the speed of motor vehicles. The _(identify prosecuting agency)_ [1] is not required to prove the underlying scientific reliability of the method used by the measurement device.

The _(identify prosecuting agency)_ is required to prove that the device was in proper working order and that it was properly operated by a qualified person.[2]

The weight to be given to the speed measurement in this case is for you, the jury, to determine.

COMMENT

Wis JI-Criminal 2679 was originally published in 1986. The comment was revised in 1987 and 1988 and republished without change in 1995 and 2010.

This instruction may be used in cases involving both moving and stationary radar. Regarding stationary radar see note 1, below.

The reliability of speed measurement by moving radar devices was considered by the Wisconsin Supreme Court in State v. Hanson, 85 Wis.2d 233, 270 N.W.2d 212 (1978). The court held that courts "may take judicial notice of the reliability of the underlying principles of speed radar detection that employs the Doppler effect as a means of determining the speed of moving objects. To this end, expert testimony is not needed to determine the initial admissibility of speed radar readings. The radar reading may be introduced by the operating law enforcement official, if he is qualified in its use and operation." 85 Wis.2d 233, 244-45. The court emphasized that the accuracy of a given speed reading is another matter — it depends on the particular conditions surrounding the reading.

A moving radar speed reading is admissible upon testimony of a competent, operating police officer that:

1. the officer operating the device had adequate training and experience in its operations;

2. the device was in proper working condition at the time of the alleged offense;

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3. the road conditions at the site of the alleged offense were such that there was a minimum possibility of distortion;

4. the input speed of the patrol car was verified;

5. the patrol car's speed meter was expertly tested within a reasonable time following the arrest by means which did not rely on the radar device's own internal calibrations.

Regarding the verification of the speed of the patrol car, see Washington County v. Luedtke, 135 Wis.2d 131, 399 N.W.2d 906 (1987):

> We hold that the fourth criterion of Hanson/Kramer is met by testimony that verification has been accomplished by a visual comparison of the speedometer with the radar read-out. It is unnecessary, indeed irrelevant to the prosecution's proof, to establish that the patrol car's speedometer has been separately checked and certified to be correct.

135 Wis.2d 131, 141-42.

The Hanson criteria, particularly those relating to testing the radar device, are discussed in State v. Kramer, 99 Wis.2d 700, 299 N.W.2d 882 (1981).

The VASCAR method of radar speed detection is also entitled to "a prima facie presumption of accuracy." Expert testimony is not required to establish a foundation for its admissibility. State v. Frankenthal, 113 Wis.2d 269, 335 N.W.2d 890 (Ct. App. 1983).

1. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

2. This sentence is not necessary in stationary radar cases. "Whether the test was properly conducted or the instruments used were in good working order is a matter of defense." City of Wauwatosa v. Collett, 99 Wis.2d 522, 299 N.W.2d 620 (Ct. App. 1980).

Collett held that the Hanson criteria apply only to moving radar devices and stationary radar devices are entitled to a presumption of accuracy without Hanson-type testimony.

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2680 NONCRIMINAL TRAFFIC VIOLATIONS: PROHIBITED BY STATE LAW OR AN ORDINANCE ADOPTING STATE LAW

[THE FOLLOWING IS A MODEL TO BE USED IN DEVELOPING AN INSTRUCTION FOR A NONCRIMINAL TRAFFIC VIOLATION FOR WHICH THERE IS NO UNIFORM INSTRUCTION]

Statutory Definition of the Offense

[Ordinance _____, adopting][1] Section _____ of the Wisconsin Statutes, provides that (read the statute or ordinance).

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[2] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following _____ elements were present.

Elements That the State Must Prove

1. LIST EACH ELEMENT, INCLUDING DEFINITIONS WHEN NECESSARY

2.

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that _____ elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2680 was originally published in 1985 and revised in 1994 and 2010. This revision involved a nonsubstantive correction to a caption in the text.

This instruction is intended to serve as a model for the many noncriminal traffic violations that may occasionally be tried to a jury but which arise too infrequently to warrant the publication of a separate uniform instruction.

There are two general instructions for forfeiture actions: Wis JI-Criminal 140.1, Burden of Proof: Forfeiture Actions; and Wis JI-Criminal 515.1, Five-Sixths Verdict and Selection of Presiding Juror: Forfeiture Actions.

There are uniform criminal instructions for some of the common noncriminal violations, see 2620A Operating After Revocation (Forfeiture), 2650 Reckless Driving, 2660A Operating With 10% Or More BAC (Forfeiture), 2663A Operating Under The Influence (Forfeiture), and 2672-78 Speeding.

For some violations, there are uniform civil jury instructions which may be helpfully incorporated into the model.

	Offense	Wis JI-Civil
346.13(1)	Deviating In Traffic	1355
346.14(1)	Distance Between Vehicles (Tailgating)	1112
346.37(1)	Vehicle Passing Through Red Or Yellow Signal	1192, 1193
346.46(1)	Stopping At Stop Signs	1325, 1325A
346.59	Minimum Speed Regulations	1300, 1305

Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. Sec. 346.02(1). (There are two such provisions: § 346.61 which applies to reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; and § 346.66 which applies to offenses defined in §§ 346.67 to 346.70. Both § 346.61 and § 346.66 provide that those statutes listed are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of a motor vehicle offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

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1. Since ordinances may be adopted by a variety of governmental entities — county, city, town, etc. — the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

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2682A TAMPERING WITH AN IGNITION INTERLOCK DEVICE — § 347.413

Statutory Definition of the Crime

Section 347.413(1) of the Wisconsin Statutes is violated by one who removes, disconnects, tampers with, or otherwise circumvents the operation of an ignition interlock device installed on a motor vehicle in response to a court order and that motor vehicle is operated on or occupies a highway.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was subject to a court order under § 343.301 requiring the installation of an ignition interlock device on a motor vehicle.[1]
2. The defendant (removed) (disconnected) (tampered with) (or) (otherwise circumvented the operation of) the ignition interlock device installed in response to the court order.
3. The motor vehicle (was operated on) (occupied) a highway.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2682A was originally published in 2010 and revised in 2012. This revision was approved by the Committee in February 2014; it amended the third element.

This instruction is drafted for one of the two types of criminal violations under § 347.413, Ignition interlock device tampering; failure to install. This instruction addresses removing, disconnecting, tampering with, or otherwise circumventing the operation of an ignition interlock device installed in response to the court order under § 346.65(6), 1999 stats., or § 343.301(1), 2007 stats., or § 343.301(1g). Penalties are set forth in § 347.50.

See Wis JI-Criminal 2682B for the other type of violation: failing to have the ignition interlock device installed as ordered by the court.

1. Section 347.413 applies to ignition interlock installation ordered under three different statutes. Section 343.301 (1g) is the authority under current [2009-10] statutes. Also covered are orders issued under § 346.65(6), 1999 stats., and § 343.301(1), 2007 stats. The statute under which the order was issued should be accurately identified in the instruction. The Committee concluded that a reference to "§ 343.301" is sufficient for orders under current statutes and the 2007 statutes; for the other option, the reference should be to "§ 346.65 of the 1999 Wisconsin Statutes."

Section 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. This element was added to the instruction as part of the 2012 based on § 347.02(2) which provides: "No provision of this chapter requiring or prohibiting certain types of equipment on a vehicle is applicable when such vehicle is not operated upon or occupying a highway." As originally published, the element required that "the defendant operated that motor vehicle on a highway." The 2014 revision changed the element to require that the vehicle must be operated on or occupy the highway. The Committee concluded that the defendant need not be the individual who operated it.

Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

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2682B FAILING TO INSTALL AN IGNITION INTERLOCK DEVICE — § 347.413

Statutory Definition of the Crime

Section 347.413(1) of the Wisconsin Statutes is violated by one who fails to install an ignition interlock device on a motor vehicle as ordered by a court and that motor vehicle is operated on or occupies a highway.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was subject to a court order under § 343.301 requiring the installation of an ignition interlock device on a motor vehicle.[1]
2. The defendant failed to install the ignition interlock device as ordered.[2]
3. The motor vehicle (was operated on) (occupied) a highway.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2682B was originally published in 2010 and revised in 2012. This revision was approved by the Committee in February 2014; it amended the third element.

This instruction is drafted for one of the two types of criminal violations under § 347.413, Ignition interlock device tampering; failure to install. This instruction addresses failing to have the ignition interlock device installed as ordered by the court under § 346.65 (6), 1999 stats., or § 343.301(1), 2007 stats., or § 343.301(1g). Penalties are set forth in § 347.50.

See Wis JI-Criminal 2682A for the other type of violation: removing, disconnecting, tampering with, or otherwise circumventing the operation of an ignition interlock device installed in response to the court order.

Note: The violation addressed by this instruction only applies to vehicles registered in the convicted person's name. This is because the authority to issue an order under § 343.301(1g) applies only to "each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration." If, for example, a person subject to an order is found operating a vehicle registered to his girlfriend and no interlock device has been installed on that vehicle, there is no violation of § 347.413.

1. Section 347.413 applies to ignition interlock installation ordered under three different statutes. Section 343.301 (1g) is the authority under current [2009-10] statutes. Also covered are orders issued under § 346.65(6), 1999 stats., and § 343.301(1), 2007 stats. The statute under which the order was issued should be accurately identified in the instruction. The Committee concluded that a reference to "§ 343.301" is sufficient for orders under current statutes and the 2007 statutes; for the other option, the reference should be to "§ 346.65 of the 1999 Wisconsin Statutes."

2. The Committee did not include a mental element in the instruction — such as "intentionally" or "knowingly" failed to install the device — because the statute defining the offense does not expressly provide for a mental element. The Committee's approach, for both Criminal Code offense and offenses found outside the Criminal Code, is to include a mental element only where the statute uses one of the intent-indicating words as set forth in sec. 939.23(1). Wisconsin courts generally follow the same rule, with one notable exception. See State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977), where the Wisconsin Supreme Court added a mental element for operating after revocation offenses where the statute did not include it. [Note: The statute has since been amended to add "knowingly" to the offense definition. See 1997 Wisconsin Act 84.]

3. This element was added to the instruction as part of the 2012 based on § 347.02(2) which provides: "No provision of this chapter requiring or prohibiting certain types of equipment on a vehicle is applicable when such vehicle is not operated upon or occupying a highway." As originally published, the element required that "the defendant operated that motor vehicle on a highway." The 2014 revision changed the element to require that the vehicle must be operated on or occupy the highway. The Committee concluded that the defendant need not be the individual who operated it.

Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

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2690 OPERATING A COMMERCIAL MOTOR VEHICLE WITH AN ALCOHOL CONCENTRATION OF 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS — CRIMINAL OFFENSE — § 346.63(5)(a)

Statutory Definition of the Crime

Section 346.63(5)(a) of the Wisconsin Statutes is violated by one who drives or operates a commercial motor vehicle on a highway[1] while that person has an alcohol concentration of .04 or more but less than .08.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a commercial motor vehicle[2] on a highway.[3]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant had an alcohol concentration of .04 or more but less than .08[6] at the time the defendant (drove) (operated) a commercial motor vehicle.

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How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING 0.04 GRAMS OR MORE HAVE BEEN ADMITTED[7] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[8] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied beyond a reasonable doubt that there was [.04 grams or more of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had an alcohol concentration of .04 or more at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had an alcohol concentration of .04 or more at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[9]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device.

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However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2690 was originally published in 1993. This revision was approved by the Committee in August 2003.

This revision reflects the change in the prohibited alcohol concentration level for this offense from "more than 0.04 but less than 0.10" to "more than 0.04 but less than 0.08" made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a criminal offense under § 346.63(5)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals 2 . . ." Section 346.65(2j). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

First violations of the statute are forfeitures. There is not a uniform instruction for the forfeiture offense, but see Wis JI-Criminal 2660A for an instruction for a forfeiture offense involving a non-commercial motor vehicle.

The maximum penalty for this offense is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2j)(d) and Wis JI-Criminal 999.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus,

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152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

Note that § 346.63(7)(a) imposes an absolute sobriety requirement on commercial motor vehicle operators during on duty time. Violations are punished by a forfeiture of $10; any refusal to take a chemical test is a separate violation. § 346.65(2u).

The implied consent law requires that notice of commercial motor vehicle license sanctions be included in the implied consent warnings given to suspects. See § 343.305(4)(b) and (c). These warnings must be given to drivers whenever the officer knows that the suspect holds a commercial motor vehicle license. State v. Geraldson, 176 Wis.2d 487, 500 N.W.2d 415 (Ct. App. 1993). The commercial motor vehicle warnings need not to be given to suspects who are not licensed as a commercial motor vehicle operator. State v. Piskula, 168 Wis.2d 135, 483 N.W.2d 250 (Ct. App. 1992).

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. If definition of "commercial motor vehicle" is necessary, see § 340.01(8), which provides as follows:

> (8) "Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics:
> (a) The vehicle is a single vehicle with a gross vehicle weight rating of 26,001 or more pounds or the vehicle's registered weight or actual gross weight is more than 26,000 pounds.
> (b) The vehicle is a combination vehicle with a gross combination weight rating, registered weight or actual gross weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating, registered weight or actual gross weight of more than 10,000 pounds.
> (c) The vehicle is designed to transport or is actually transporting the driver and 15 or more passengers. If the vehicle is equipped with bench type seats intended to seat more than one person, the passenger carrying capacity shall be determined under s. 340.01(31) or, if the vehicle is a school buss, by dividing the total seating space measured in inches by 13.
> (d) The vehicle is transporting hazardous materials requiring placarding.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. Section 340.01(1v) provides that "alcohol concentration" means the number of grams of alcohol per 100 milliliters of a person's blood or the number of grams of alcohol per 210 liters of a person's breath. For this offense the prohibited range is more than 0.04 grams but less than 0.08 grams.

7. Section 885.235(1)(d) provides that test results in this range are "prima facie evidence" of an alcohol concentration of .04 or more at the time of the driving.

This instruction, therefore, advises the jury that a test result showing an alcohol concentration of .04 or more is sufficient evidence upon which to base a finding that the person had such a concentration at the

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time of the driving. But the jury is also advised that they are not required to make such a finding and that they may only find that the defendant had an alcohol concentration of .04 or more at the time of the driving if they are so satisfied beyond a reasonable doubt from all the evidence in the case. In the Committee's judgment, this is the type of instruction required by Wis. Stat. § 903.03.

8. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2695 OPERATING A MOTORBOAT WHILE UNDER THE INFLUENCE OF AN INTOXICANT: CRIMINAL OFFENSE — § 30.681(1)(a) and § 30.80(6)(a)2.

Statutory Definition of the Crime

Section 30.681(1)(a) of the Wisconsin Statutes is violated by one who operates a motorboat while under the influence of an intoxicant to a degree which renders that person incapable of safe motorboat operation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motorboat.

   "Operate" means to control the speed or direction of a motorboat.[1]

   "Motorboat" means any boat equipped with propulsion machinery, whether or not the machinery is the principal source of propulsion.[2]

2. At the time the defendant operated a motorboat, the defendant was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of safe motorboat operation.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a motorboat was impaired because of consumption of an alcoholic beverage.

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Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motorboat.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe operation. What is required is that the person's ability to safely control the motorboat be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a motorboat is evidence of the defendant's alcohol concentration at the time of the operating.[3]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[4]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[5] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[6] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on

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the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[7]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2695 was approved by the Committee in March 2012.

This instruction is drafted for second or subsequent violations of §30.681(1)(a), which are crimes. See §30.80(6)(a)2. As with regular operating under the influence offenses, the fact of a prior conviction is not an element of the criminal offense. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

A first offense under § 343.05 is a civil forfeiture. To use this instruction for the forfeiture offense, modify the instruction by substituting "to a reasonable certainty by evidence which is clear, satisfactory, and convincing" for "beyond a reasonable doubt." It may also be necessary to change the reference from "the state" to the unit of government that is prosecuting the case. See Wis JI-Criminal 2680 for a model.

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This instruction is based on a violation for operating under the influence. For violations involving a prohibited alcohol concentration under §30.681(1)(b)1., see Wis JI-Criminal 2660 for a model. For cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of operation, see Wis JI-Criminal 2696. For violations involving a detectable amount of a restricted controlled substance under § 30.681(1)(b)1m., Wis JI-Criminal 2664B for a model.

1. This is based on the definition provided in § 30.50(8g): "'Operation of a motorboat' means controlling the speed or direction of a motorboat, except a sailboat operating under sail alone."

2. This is the definition of "motorboat" provided in § 30.50(6). Also see § 30.50(9d) which defines "personal watercraft" as a "motorboat."

3. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. The statute specifically includes offenses involving operation of a motorboat. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

4. It may be that cases will be charged under § 30.681(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

5. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

6. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

7. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2696 OPERATING A MOTORBOAT WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTORBOAT WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CRIMINAL CHARGE — §§ 30.681(1)(a) and 30.681(1)(b)1.

Statutory Definition of the Crime

The first count in the criminal complaint charges that the defendant operated a motorboat while under the influence of an intoxicant to a degree which renders that person incapable of safe motorboat operation in violation of § 30.681(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant operated a motorboat while the defendant had a prohibited alcohol concentration in violation of § 30.681(1)(b)1. of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.[1]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[2]

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 — Operating Under The Influence

Section 30.681(1)(a) of the Wisconsin Statutes is violated by one who operates a motorboat while under the influence of an intoxicant to a degree which renders that person incapable of safe motorboat operation.

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State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of Count 1 — Operating Under The Influence

1. The defendant operated a motorboat.

   "Operate" means to control the speed or direction of a motorboat.[3]

   "Motorboat" means any boat equipped with propulsion machinery, whether or not the machinery is the principal source of propulsion.[4]

2. At the time the defendant operated a motorboat, the defendant was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of safe motorboat operation.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a motorboat was impaired because of consumption of an alcoholic beverage.[5]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motorboat.

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It is not required that impaired ability to operate be demonstrated by particular acts of unsafe operation. What is required is that the person's ability to safely control the motorboat be impaired.

Definition of Count 2 — Operating With A Prohibited Alcohol Concentration

Section 30.681(1)(b)1. of the Wisconsin Statutes is violated by one who operates a motorboat with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following two elements were present.

Elements of Count 2 — Prohibited Alcohol Concentration

1. The defendant operated a motorboat.
2. The defendant had a prohibited alcohol concentration at the time the defendant operated a motorboat.

"Prohibited alcohol concentration" means[6]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a motorboat is evidence of the defendant's alcohol concentration at the time of the operating.[7]

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WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant operated a motorboat while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant operated a motorboat while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.

COMMENT

Wis JI-Criminal 2696 was approved by the Committee in June 2012.

This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of § 30.681(1)(a); and, one alleging operating with a prohibited alcohol concentration of 0.08 or more in violation of § 30.681(1)(b)1. It is based on Wis JI-Criminal 2669 and is intended to implement the procedure set forth in § 30.681(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is drafted for criminal charges; for two civil forfeiture offenses, see Wis JI-Criminal 2668 for a model.

The constitutionality of the two-charge procedure for operating a motor vehicle under the influence was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

1. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal 115 is also given, the statement need not be repeated here.

2. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the statement need not be repeated here.

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3. This is based on the definition provided in § 30.50(8g): "'Operation of a motorboat' means controlling the speed or direction of a motorboat, except a sailboat operating under sail alone."

4. This is the definition of "motorboat" provided in § 30.50(6). Also see § 30.50(9d) which defines "personal watercraft" as a "motorboat."

5. The instruction is drafted for cases involving the influence of an intoxicant. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

6. The definitions are those provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V. Section 30.50(1g) provides that "alcohol concentration" has the meaning given in s. 340.01(1v).

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. It may be that cases will be charged under § 30.681(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2902 OFFERING OR SELLING AN UNREGISTERED SECURITY — §§ 551.301 and 551.508

Statutory Definition of the Crime

Section 551.301 of the Wisconsin Statutes is violated by a person who willfully offers or sells any security in this state unless the security is registered or the security or transaction is exempt from registration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The item [offered] [sold] was a security as defined by Wisconsin law.

   A [insert applicable term from § 551.102(28)] is a security.[1]

2. The defendant [offered] [sold] the security in this state.[2]

   ["Offered" includes every attempt or offer to sell or dispose of a security or interest in a security for value.][3]

   ["Sold" includes every sale, disposition or exchange, and every contract of sale of, or contract to sell, a security or interest in a security for value.][4]

3. The item [offered] [sold] was not registered under the Wisconsin Uniform Securities Law and was not exempt from registration.

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If no order of registration was issued by the Commissioner of Securities for the State of Wisconsin, the security has not been registered under the Wisconsin Uniform Securities Law.

IF THERE IS EVIDENCE TENDING SHOW THE BASIS FOR AN EXEMPTION FROM REGISTRATION, THE INSTRUCTION SHOULD DEFINE THE APPLICABLE EXEMPTION — SEE §§ 551.201, 551.202, AND 551.203.[5]

4. The defendant [offered] [sold] the unregistered and non-exempt security willfully.

"Willfully" requires that the defendant knowingly committed the acts charged.

"Willfully" also requires that the defendant knew that (describe the security) was a security and knew that it was not registered and not exempt from registration.[6] Proof of intent to violate the law or knowledge that the law was being violated is not required.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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ADD THE FOLLOWING[7] IF THE DEFENDANT HAS BEEN CHARGED UNDER § 551.508(1m): THE VICTIM WAS AT LEAST 65 YEARS OF AGE WHEN THE CRIME WAS COMMITTED:

If you find the defendant guilty, you must consider the following question:

Was (name of victim) at least 65 years of age when the crime was committed?

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that (name of victim) was at least 65 years of age when the crime was committed.

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 2902 was originally published in 1998 and revised in 2004, 2009, and 2010. The 2009 revision reflected changes made in Chapter 551 by 2007 Wisconsin Act 196. The 2010 revision added the special question for cases involving victims over 65 years of age. The 2014 revision made a correction in footnote 1.

This instruction is for violations of § 551.301. Section 551.508 provides that persons who willfully violate the provisions of Chapter 551 are guilty of a Class H felony. 2009 Wisconsin Act 196 created § 551.508(1m) which provides for a penalty increase if the crime is committed against a person who is at least 65 years of age when the crime is committed. A special question has been added for cases where the penalty increase applies.

1. Section 551.102(28) provides an extensive definition of "security." If the item involved in the case is alleged to be an item specified in that definition, the Committee recommends that the jury simply be told, for example, that "common stock is a security." It is for the jury to determine whether the item involved in the case is in fact common stock.

Until the 2014 revision, this footnote referred to a definition of "investment contract" in the Wisconsin Administrative Code — DCF 1.02(6)(a). That definition was deleted from the Administrative Code when the securities law statutes were revised effective January 1, 2009, but the revision incorporated the equivalent of the former Code definition into the statutory definition of "security" — see § 551.102(208). This process is explained in State v. Hudson, 2013 WI App 120, 351 Wis.2d 73, 839 N.W.2d 147, ¶¶ 14 and 15.

In State v. Johnson, 2002 WI App 224, 257 Wis.2d 736, 652 N.W.2d 642, the court held that offers involving promises to repay loans at above market rates were offers to sell "securities." The court adopted the "family resemblance" test articulated in Reves v. Ernst & Young, 494 U.S. (1990), previously applied in State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996).

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In State v. LaCount, 2008 WI 59, 310 Wis.2d 85, 750 N.W.2d 780, the court held that it was not error to allow a lawyer to testify as an expert regarding what an "investment contract" is. Further, the evidence was sufficient to establish that the investment in this case was a security.

A promissory note issued to a sold investor is "security" under the securities fraud statute. State v. McGuire, 2007 WI App 139, 302 Wis.2d 688, 735 N.W.2d 555.

2. Section 551.613 describes situations that are covered by the "in this state" requirement but where not all of the aspects of the transactions or the participants are present in Wisconsin. If a particular situation raises a factual issue in the case, it may be necessary to provide instruction on that situation.

3. The definition of "offer" is based on the one provided in § 551.102(26).

"[B]y its plain terms, Wis. Stat. § 551.21(1) [now 551.301] is violated through an offer to sell an unregistered security, even if no sale actually occurs. Therefore, the issuance of a promissory note, debenture or other evidence of indebtedness containing the terms agreed upon when the loan was made is not a necessary element . . ." State v. Johnson, 2002 WI App 224, ¶11, 257 Wis.2d 736, 652 N.W.2d 642.

4. The definition of "sold" is based on the one provided in § 551.102(26).

5. Section 551.301(2) provides: "It is unlawful to offer or sell any security in state unless it is registered . . . or the security or transaction, or offer is exempted under this chapter." Section 551.201 provides an extensive list of exempt securities; section 551.202 provides an extensive list of exempt transactions, and section 551.203 refers to "additional exemptions and waivers."

Because the reference to exemption is contained in the definition of the offense, the Committee concluded that it is a fact the State must prove to support a finding of guilt. However, consistent with the general rule that is applied to exceptions in criminal statutes, proof of the absence of specific exemptions is not required until the basis therefor is raised by the evidence. See, for example, State v. Williamson, 58 Wis.2d 514, 206 N.W.2d 613 (1973), addressing § 941.23 which prohibits carrying a concealed weapon by persons other than a peace officer. Williamson has been interpreted to mean that the state need not prove that the defendant is not one of the many officials who qualify as "peace officers" until there is evidence in the case that the defendant may be one of those officials. See Wis JI-Criminal 1335.

6. The Committee carefully reconsidered the "willfully" element in 2003. The origin of the "willfully" requirement is § 551.508(1), which provides that "a person who willfully violates any provision of this chapter . . . is guilty of a Class H felony." The Committee concluded that "willfully" as applied to violations of § 551.301 required knowledge that the item was a security and knowledge that it was not registered and not exempt. The Wisconsin Supreme Court has held that "willfully" has the same meaning as "intentionally." State v. Cissell, 127 Wis.2d 205, 211-12, 378 N.W.2d 691 (1985). Section 939.23(3) provides that, when used in the Criminal Code, "intentionally" has the following meaning:

> 'Intentionally' means that the actor either has purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'

In State v. Williams, 179 Wis.2d 80, 88-89, 505 N.W.2d 468 (Ct. App. 1993), the court cited Cissell with approval in connection with the offense of willfully making a false statement on an application for a medical

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assistance benefit or payment, though the court fell short of completely applying the § 939.23(3) definition to the elements of the crime.

Applying the Criminal Code definition of "intentionally" to the offense defined in § 551.301 yields the requirement that the defendant know that the item was a security and know that it was not registered and not exempt. This results in a more demanding mental state than other states require under statutes based on the same model act as Wisconsin's. While § 551.615 requires that the Wisconsin securities statutes be construed to be uniform with the law of other states that have adopted the Uniform Securities Act, the Committee concluded that in the absence of direct Wisconsin authority, the Cissell holding that "willfully" has the same meaning as "intentionally" could not be ignored.

Two Wisconsin appellate decisions have addressed the mental element required for securities fraud offenses. In State v. Ross, 2003 WI App 27, ¶27, 260 Wis.2d 291, 659 N.W.2d 122, the court of appeals affirmed a conviction based on violations of § 551.21 [now § 551.301]. The court upheld the trial court's denial of a requested instruction on the "advice of counsel" defense, holding that "Ross's specific state of mind was not relevant to any of the elements of the crimes with which he had been charged." However, the defense request was apparently not targeted to a specific knowledge requirement, since the court began the discussion with the statement that "under neither the securities fraud statutes nor WOCCA is the State required to prove that the accused acted with intent to defraud or with knowledge that the law was violated." 2003 WI App 27, ¶27.

As to violations of § 551.501, Wisconsin courts have also held that "willfully" does not require proof of intent to defraud or knowledge that the law was violated; it is sufficient that the defendant "knowingly committed the act charged." State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996). See Wis JI-Criminal 2904, which is drafted for violations of § 551.501. The Committee concluded that the result in Mueller does not require a more limited mental state for violations of § 551.301. Under the Mueller decision, violations of § 551.501 still require a culpable mental state: knowingly making an untrue statement or knowingly omitting a material fact necessary to make statements made not misleading. Under § 551.301 no culpable mental state would remain if "willfully" was limited to knowingly offering or selling an item.

The 2003 revision added the sentence: "Proof of intent to violate the law or knowledge that the law was being violated is not required." This is not inconsistent with requiring knowledge that the item was an unregistered security. Under the standard in the instruction, the defendant must know that the item was a security and that it was not registered or exempt from registration. The defendant need not intend to violate the securities law or know that it is against the law to sell or offer an unregistered security.

7. Section 551.508(1m) provides that if a securities fraud offense "is committed against another person who is at least 65 years of age when the crime is committed, . . . the maximum fine . . . may be increased by not more than $5000 and the maximum term of imprisonment . . . may be increased by not more than 5 years." Where the offense involving the penalty increase is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

> If you find the defendant guilty, answer the following question "yes" or "no":
>
> Was (name of victim) at least 65 years of age when the crime was committed?

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2904 SECURITIES FRAUD: MAKING AN UNTRUE STATEMENT OF MATERIAL FACT IN CONNECTION WITH THE SALE OF A SECURITY — §§ 551.501(2) and 551.508

Statutory Definition of the Crime

Section 551.501(2) of the Wisconsin Statutes is violated by a person who willfully makes an untrue statement of material fact, or omits to state a material fact necessary to make the statements made not misleading, in connection with the offer, sale or purchase of any security in this state.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The item [offered] [sold] was a security as defined by Wisconsin law.

   A [insert applicable term from § 551.102(28)] is a security.[1]

2. The defendant [made an untrue statement of material fact] [omitted to state a material fact necessary to make the statements made not misleading] in connection with the offer, sale or purchase of a security in this state.[2]

   ["Offered" includes every attempt or offer to sell or dispose of a security or interest in a security for value.][3]

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["Sold" includes every sale, disposition or exchange, and every contract of sale of, or contract to sell, a security or interest in a security for value.][4]

A fact is a "material fact" if it could be expected to influence a reasonable investor in making a decision whether to purchase an investment.[5]

[A fact is also a "material fact" if the maker of the representation knows that the investor regards the matter as important in making a decision whether to purchase an investment, even though a reasonable investor would not regard it as important.][6]

3. The defendant acted willfully.

"Wilfully" requires that the defendant knowingly [made an untrue statement of material fact] [omitted to state a material fact necessary to make the statements made not misleading] in connection with the offer, sale or purchase of a security. Proof of intent to violate the law or knowledge that the law was being violated is not required.[7]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[8] IF THE DEFENDANT HAS BEEN CHARGED UNDER § 551.508(1m): THE VICTIM WAS AT LEAST 65 YEARS OF AGE WHEN THE CRIME WAS COMMITTED:

If you find the defendant guilty, you must consider the following question:

Was (name of victim) at least 65 years of age when the crime was committed?

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that (name of victim) was at least 65 years of age when the crime was committed.

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 2904 was originally published in 1998 and revised in 2004, 2009 and 2010. The 2010 revision added the special question for cases involving victims over 65 years of age. The 2014 revision made a correction in footnote 1.

This instruction is for violations of § 551.501(2). Section 551.508 provides that persons who violate the provisions of Chapter 551 are guilty of a Class H felony. 2009 Wisconsin Act 196 created § 551.508(1m) which provides for a penalty increase if the crime is committed against a person who is at least 65 years of age when the crime is committed. A special question has been added for cases where the penalty increase applies.

1. Section 551.102(28) provides an extensive definition of "security." If the item involved in the case is alleged to be an item specified in that definition, the Committee recommends that the jury simply be told, for example, that "common stock is a security." It is for the jury to determine whether the item involved in the case is in fact common stock.

Until the 2014 revision, this footnote referred to a definition of "investment contract" in the Wisconsin Administrative Code — DCF 1.02(6)(a). That definition was deleted from the Administrative Code when the securities law statutes were revised effective January 1, 2009, but the revision incorporated the equivalent of the former Code definition into the statutory definition of "security" — see § 551.102(208). This process is explained in State v. Hudson, 2013 WI App 120, 351 Wis.2d 73, 839 N.W.2d 147, ¶¶ 14 and 15.

In State v. Johnson, 2002 WI App 224, 257 Wis.2d 736, 652 N.W.2d 642, the court held that offers involving promises to repay loans at above market rates were offers to sell "securities." The court adopted

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the "family resemblance" test articulated in Reves v. Ernst & Young, 494 U.S. (1990), previously applied in State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996).

In State v. LaCount, 2008 WI 59, 310 Wis.2d 85, 750 N.W.2d 780, the court held that it was not error to allow a lawyer to testify as an expert regarding what an "investment contract" is. Further, the evidence was sufficient to establish that the investment in this case was a security.

A promissory note issued to a sold investor is "security" under the securities fraud statute. State v. McGuire, 2007 WI App 139, 302 Wis.2d 688, 735 N.W.2d 555.

2. Section 551.613 describes situations that are covered by the "in this state" requirement but where not all of the aspects of the transactions or the participants are present in Wisconsin. If a particular situation raises a factual issue in the case, it may be necessary to provide instruction on that situation.

3. The definition of "offer" is based on the one provided in § 551.102(26).

4. The definition of "sale" is based on the definition of "offer to sell" provided in § 551.102(26).

5. The definition of "material fact" is based on the definition used in 23.06 Materiality, Federal Criminal Jury Instructions, Potuto, Saltzburg and Perlman (2d edition) Michie 1993. The Comment to that instruction indicates that the definition is taken from the test in SEC v. Texas Gulf Sulphur, 401 F.2d 833, 849 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969). The Texas Gulf Sulphur test is based on § 538(2)(a), Restatement of Torts 2d. The test is an objective one, asking whether a reasonable person would attach importance to a particular fact. The actual importance accorded a fact by the investor in any particular case is not determinative if the hypothetical reasonable investor would have considered the fact to be material.

This definition is consistent with the standard adopted in State v. Johnson, 2002 WI App 224, ¶21, 257 Wis.2d 736, 652 N.W.2d 642: ". . . an objective standard, wherein the fact finder assesses whether the omitted or misrepresented fact would have made a difference to a reasonable investor's decision to invest. See Ollerman v. O'Rourke Co., 94 Wis.2d 17, 42, 288 N.W.2d 95 (1980); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976)."

6. This is based on § 538 (2)(b) of the Restatement of Torts, 2d. The full text of that provision reads as follows:

> (2) The matter is material if
>
> . . .
>
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

The Committee concluded this should be included in brackets in the instruction, for use in a case where it is supported by the facts.

7. The origin of the "willfully" requirement is § 551.508(1), which provides that "[a]ny person who willfully violates any provision of this chapter . . . may be fined not more than $5,000 or imprisoned not more than 5 years or both." Wisconsin courts have held that for violations of § 551.4 [now 551.501], "willfully" does not require proof of intent to defraud or knowledge that the law was violated; it is sufficient that the defendant "knowingly committed the act charged." State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996).

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8. Section 551.508(1m) provides that if a securities fraud offense "is committed against another person who is at least 65 years of age when the crime is committed, . . . the maximum fine . . . may be increased by not more than $5000 and the maximum term of imprisonment . . . may be increased by not more than 5 years." Where the offense involving the penalty increase is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Was (name of victim) at least 65 years of age when the crime was committed?

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5000 POSSESSION OF UNTAGGED DEER — § 29.40(2)

Statutory Definition of the Crime

Possession of untagged deer, as defined in § 29.347(2) of the Wisconsin Statutes, is committed by one who possesses, controls, stores, or transports a deer carcass that is not tagged as required by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a deer carcass.[1]

   "Possessed" means that the defendant knowingly had actual physical control of a carcass.[2]

2. The deer carcass was not tagged as required by law.

   Wisconsin law requires that any person who kills a deer shall immediately attach to the ear or antler of the deer a current validated deer carcass tag which is authorized for use on the type of deer killed.[3]

   "Validated" means marked with specified information in the manner required by the department.[4]

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 5000 was originally published in 1992. This revision was approved by the Committee in December 2002 and involved adoption of a new format.

Violations of § 29.347 are punished "by a fine of not less than $1,000 nor more than $2,000 or by imprisonment for not more than 6 months or both." § 29.971(11). If a fine is imposed, "the court shall impose a natural resources assessment equal to 75% of the amount of the fine. . ." § 29.987(1)(a).

1. Section 29.001(18) provides the following definition of "carcass":

> "Carcass" means the dead body of any wild animal, including any part of the wild animal or the eggs of the wild animal.

2. This is the basic definition of "possession" provided in Wis JI-Criminal 920. See that instruction for optional paragraphs for possible use where an item is not in "the actual physical control" of the person or where possession is shared with another.

The statute applies not only to "possesses" but also to "controls, stores, or transports." The instruction does not include the other alternatives because the Committee concluded that they are covered by the more general term.

3. This standard is found in the first sentence of § 29.347(2). Exceptions to the tagging requirement are specifically set forth in the statute: "car kills" under § 29.347(5); and group hunting permits under § 29.324(3) where someone other than the killer of the deer may attach the tag.

4. This is the definition provided in § 29.347(1)(b).

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5010 FAILURE TO FILE AN INDIVIDUAL[1] INCOME TAX RETURN — § 71.83(2)

Statutory Definition of the Crime

Failure to file an income tax return, as defined by § 71.83(2) of the Wisconsin Statutes, is committed by a person who is required by law to file[2] a return and who willfully fails to file a return at the time required by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person required by law to file a return of (his) (her) income for the taxable year ending _____.

   A person is required to file a state income tax return for any calendar year in which the person has a gross income of _____.[3]

   The term "gross income" means all income derived from any source and in any form, whether in money, property, or services. The term "gross income" includes compensation for services, including salaries, wages and fees, commissions, and similar items.[4]

   A person is required to file a return whether or not a tax is due.

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2. The defendant failed to file the return at the time required by law, which was on or before April 15, _____.[5]

Individual income tax returns are required to be filed on or before April 15 following the year of the earning of the gross income and must be filed [by mailing them to the Department of Revenue in Madison, Dane County, Wisconsin.] [in the manner specified by the Department of Revenue.[6]]

3. The defendant's failure to file the return was willful.

The failure to file a timely return is willful if the defendant knew (he) (she) was required to file and deliberately did not file a return.[7]

This does not require the State to prove that the defendant had a purpose to evade a tax or to defraud the State of Wisconsin.[8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 5010 was originally published in 1983 and revised in 1991. This revision was approved by the Committee in October 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for the misdemeanor offenses of willfully failing to file an income tax return as defined in § 71.83(2)(a)1. See the text of the statute in note 1, below.

Wis JI-Criminal 5012 is drafted for the felony offense of filing a false or fraudulent return under § 71.83(2)(b).

1. This instruction is drafted for the failure to file an individual return, which is prohibited by § 71.83(2)(a)1. The statute also covers returns other than individual returns:

> (2) Criminal (a) Misdemeanor. 1. 'All persons.' If any person, including an officer of a corporation or a manager of a limited liability company required by law to make, render, sign or verify any return, willfully fails or refuses to make a return at the time required in § 71.03, 71.24, or 71.44, or willfully fails or refuses to make deposits or payments as required by § 71.65(3) or willfully renders a false or fraudulent statement required by § 71.65(1) and (2) or deposit report or withholding report required by § 71.65(3), such person shall be guilty of a misdemeanor and may be fined not more than $10,000 or imprisoned for not to exceed 9 months or both, together with the cost of prosecution.

2. Section 71.83(2)(a)1 (see note 1, above) uses the phrase "make, render, sign, or verify" a return. The Committee concluded that simply using the word "file" throughout the instruction would be easier to understand and would be legally correct — it is the failure to file when required to do so that is the essence of this offense.

3. Here specify the requirement that applies in the case. Section 71.03(2) provides:

> (2) PERSONS REQUIRED TO FILE; OTHER REQUIREMENTS. The following shall report in accordance with this section:
>
> (a) Natural persons. Except as provided in sub. (6)(b):
>
> 1. Every individual domiciled in this state during the entire taxable year who has a gross income at or above a threshold amount which shall be determined annually by the department of revenue. The threshold amounts shall be determined for categories of individuals based on filing status and age, and shall include categories for single individuals; individuals who file as a head of household; married couples who file jointly; and married persons who file separately. . .

4. This definition is adapted from the lengthy one found in § 71.03(1).

5. The usual time limit for filing an individual return will be April 15 of the year following the earning of the income which is the subject of the return — § 71.03(6)(a). However, a different limit may occasionally apply, as where an extension of time has been granted. In those cases, the correct date should be included in the instruction.

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6. See s. TAX 2.08(3), Wisconsin Administrative Code.

7. This definition of "willful" was approved as a correct statement of the law in State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987). The definition was developed in part by relying on United States v. Pomponio, 429 U.S. 10 (1976), where the United States Supreme Court held that under the Internal Revenue Code, "willful" was to be defined as a "voluntary, intentional violation of a known legal duty." The Pomponio definition was reapproved in United States v. Cheek, 111 S.Ct. 604 (1990).

Both Olexa and Cheek reviewed the "willful" requirement in light of "tax protester" defenses. In Olexa, the court rejected the defendant's claims that she was not required to file tax returns because she was exempt from the filing requirements, that she was not a "person," and that federal reserve notes were not income. These claims were characterized as legal interpretations "not recognized by the mistake statute as valid defenses." 136 Wis.2d 475, 485.

In Cheek, the United States Supreme Court held that it was error for the trial court to instruct the jury that in order for a good-faith belief that one is not violating the law to negate willfulness, it must be objectively reasonable. Rather, it was for the jury to decide

> . . . whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.
>
> In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief.

Cheek rejected the claim that a good faith belief that the income tax is unconstitutional constitutes a defense. The court held that such claims are not inconsistent with the "willfulness" requirement:

> Rather, they reveal full knowledge of the provisions at issue. . . .
>
> We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness, need not be heard by the jury, and if they are, an instruction to disregard them would be proper.

In Olexa, the court held that "willful" was the equivalent of "intentionally" as defined in § 939.23(3). The court said that one of Olexa's defenses was essentially one of mistake: an honest error negativing the state of mind essential to the crime. § 939.43(1). The mistake defense does not apply to mistaken legal interpretations, such as Olexa's claim that she was not a "person" under the tax statutes.

The results in Olexa and Cheek are very close to being inconsistent — at the heart of both cases is the defendant's claimed belief that he or she was not required to file returns under the tax statutes and therefore lacked the mental element required. To the extent that the decisions are inconsistent, the rule in Olexa governs in Wisconsin. Cheek was not based on constitutional grounds; it was only interpretation of a federal statute.

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For a discussion of "willful" in the context of Department of Transportation rules, see Department of Transportation v. Transportation Comm'n, 111 Wis.2d 80, 330 N.W.2d 159 (1983).

8. Intent to defraud is not an element of this offense. It is the willful failure to file that is punished, thus intent to file and pay all taxes due at some future time is not a defense.

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5012 FILING A FALSE OR FRAUDULENT RETURN — § 71.83(2)(b)

Statutory Definition of the Crime

Filing a false or fraudulent income tax return, as defined in § 71.83(2)(b) of the Wisconsin Statutes, is committed by a person who files[1] a false[2] income tax return with intent to evade[3] payment of any tax required to be paid by the law.[4]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant filed an income tax return.

2. The return filed by the defendant was false.

   False means that one or more statements in the tax return were materially untrue. The state alleges that _____.[5]

3. The defendant filed a false income tax return with intent to evade payment of income taxes.

   The term "intent to evade payment of income taxes" means that the defendant had the mental purpose to evade[6] the payment of income taxes which were due.

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5012 was originally published in 1983 and revised in 1991. This revision was approved by the Committee in October 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for the felony offense of filing a false or fraudulent income tax return as defined in § 71.83(2)(b)1. See the text of the statute below.

Wis JI-Criminal 5010 is drafted for the misdemeanor offense of failing to file a return under § 71.83(1)(b).

Section 71.83(2)(b)1. reads as follows:

> (b) Felony 1. 'False Income Tax Return; Fraud.' Any person, other than a corporation or limited liability company, who renders a false or fraudulent income tax return with intent to defeat or evade any assessment required by this chapter is guilty of a Class H felony and may be assessed the cost of prosecution. . . .

The statutory statement of the offense is substantially paraphrased in the first paragraph of the instruction. See notes 1 through 4, below.

1. Although § 71.83(2)(b)1. uses "renders" a return, the Committee concluded it was more clear to use "files" rather than "renders." The words have the same meaning in this context and "files" ought to be substantially less confusing to the jury.

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2. The Committee concluded it was less confusing and more accurate to use "false" rather than the statutory phrase "false or fraudulent." The return must contain false statements; if it did not, it could not be "fraudulent." A false return made with intent to evade payment of taxes is a "fraudulent" return.

3. Section 71.83(2)(b)1. uses "intent to evade or defeat" while the instruction uses only "evade." The meaning of "defeat" and the sufficiency of the evidence to show "intent to defeat" is discussed in the context of civil tax "doomage" penalties in State v. Van Sustern, 154 Wis.2d 595, 453 N.W.2d 889 (1990). Also see McKinnon v. Dept. of Taxation, 261 Wis. 564, 53 N.W.2d 169 (1952).

4. The Committee believes the phrase "any tax required to be paid by the law" is the equivalent of "any assessment required by this chapter" used in § 71.83(2)(b)1.

5. Here specify the way in which the return was alleged to be false. The most common problem will be showing less gross income than was actually received. Other problems could include claiming excessive deductions, claiming tax credits to which the person was not entitled, etc.

6. See note 3, supra.

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5024 THEFT OF ANHYDROUS AMMONIA — § 101.10(3)(e)

Statutory Definition of the Crime

Section 101.10(3)(e) of the Wisconsin Statutes is violated by one who intentionally (takes) (carries away) (uses) (conceals) (retains possession of)[1] anhydrous ammonia or anhydrous ammonia equipment belonging to another, without consent and with intent to deprive the owner permanently of possession of the anhydrous ammonia or anhydrous ammonia equipment.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took (anhydrous ammonia) (anhydrous ammonia equipment) belonging to another.

   The term "intentionally" requires that the defendant had the mental purpose to take property.[2]

   ["Anhydrous ammonia equipment" means any equipment that is used in the application of anhydrous ammonia for an agricultural purpose or that is used to store, hold, transport or transfer anhydrous ammonia.][3]

2. The owner of the (anhydrous ammonia) (anhydrous ammonia equipment) did not consent[4] to the taking.

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3. The defendant knew that the owner did not consent.[5]

4. The defendant intended to deprive the owner permanently of the possession of the (anhydrous ammonia) (anhydrous ammonia equipment).

Deciding About Intent and Knowledge

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5024 was approved by the Committee in October 2002.

This instruction is for violations of § 101.10(3)(e), which was created by 2001 Wisconsin Act 3, effective date: April 18, 2001.

1. One of the five alternatives in parentheses should be selected. The rest of the instruction is drafted for a case where the act is alleged to be "takes," which, in the Committee's judgment, is the most commonly charged alternative. Note that unlike theft under § 943.20, this statute establishes separate alternatives for "takes" and "carries." Theft has "takes and carries away" as one alternative.

Selection of an alternative is base on State v. Genova, 77 Wis.2d 141, 252 N.W.2d 380 (1977), where the Wisconsin Supreme Court approved a similar construction of the theft statute. A theft charge under § 943.20 had been dismissed on the basis that the complaint charged only that the defendant had transferred property and not that he had taken the property and transferred it. The supreme court held that the complaint had been sufficient in charging only "transfer." The statute should be read as though the following "ors" appeared in it: takes and carries away, or uses, or transfers, or conceals, or retains. A violation of the statute need not include a taking from the owner.

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2. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

3. This is the definition provided in § 101.10(1)(b). "Agricultural activity" is defined in § 101.10(1)(a).

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

6. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

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5030 SALE OF INTOXICATING LIQUORS TO A MINOR BY A TAVERN KEEPER — § 176.01(2) 1965 WIS. STATS.

5040 SALE TO OR PROCUREMENT FOR ANY MINOR OF INTOXICATING LIQUORS BY ANY PERSON — § 176.01(2) 1965 WIS. STATS.

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 5030 and 5040 were originally published in 1967. The withdrawal of the instructions was approved by the Committee in 1984. The withdrawal note was republished without change in 2009.

Wis JI-Criminal 5030 and 5040 are withdrawn because the statutes defining the offenses covered by the instructions were repealed. Chapter 79, Laws of 1981, repealed Chapter 176 of the Statutes and consolidated most alcohol beverage offenses in a new chapter of the Wisconsin Statutes, Chapter 125.

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5035 SELLING FERMENTED MALT BEVERAGE WITHOUT A LICENSE — §125.04(1)

Statutory Definition of the Crime

Section 125.04(1) of the Wisconsin Statutes makes it a crime for a person to sell a fermented malt beverage without holding the appropriate license.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Charged Crime That the State Must Prove

1. The defendant sold[1] a fermented malt beverage containing 0.5% or more of alcohol by volume.[2]
2. The defendant did not hold an appropriate license for the sale of fermented malt beverage.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5035 was originally published in 1992. This revision was approved by the Committee in April 2005 and involved adoption of a new format.

This instruction is drafted for violations of § 125.04(1), which provides as follows:

> General licensing requirements. (1) License or permit; when required. No person may sell, manufacture, rectify, brew or engage in any other activity for which this chapter provides a license, permit, or other type of authorization without holding the appropriate license, permit or authorization issued under this chapter.

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. . .

Subsection (13) provides the penalty: "Any person who violates sub. (1) may be fined not more than $10,000 or imprisoned for not more than 9 months or both."

1. "Sell" is defined in § 125.02(20) as "any transfer of alcohol beverages with consideration" and as "any transfer without consideration if knowingly made for purposes of evading the law relating to the sale of alcohol beverages. . ." The Committee concluded that a jury would be likely to understand "sell" without including the statutory definition in the instruction.

Because "sell" is broadly defined to include transfers without consideration if made with intent to evade the laws, a variety of situations could be presented that would not be adequately addressed by the instruction as drafted. Common schemes to avoid restrictions on selling beer — selling the cup, for example — would appear to be covered by broader definition of "sale." The instruction should be modified to include the statutory definition or its equivalent in such cases.

2. "Fermented malt beverage" is defined as follows in § 125.02(6):

> "Fermented malt beverages" means any beverage made by the alcohol fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains of decorticated and degerminated grains or sugar containing 0.5% or more of alcohol by volume.

The Committee concluded that defining the first element to require selling a fermented malt beverage containing 0.5% or more alcohol captured the significant aspects of the statutory definition.

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5050 CAUSING INJURY OR DEATH TO AN UNDERAGE PERSON BY PROVIDING ALCOHOL BEVERAGES — § 125.075

Statutory Definition of the Crime

Section 125.075 of the Wisconsin Statutes is violated by a person who provides alcohol beverages to a person under 18 years of age and knows or should know that the person was under the legal drinking age, where the underage person (dies) (suffers great bodily harm)[1] as a result of consuming the alcohol beverages provided.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Charged Crime That the State Must Prove

1. The defendant provided alcohol beverages to (name of victim).

   "Provided," as used here, means selling, dispensing, or giving away alcohol beverages.[2]

   "Alcohol beverages" means fermented malt beverages and intoxicating liquor.[3]

2. The defendant provided alcohol beverages to (name of victim) at a time when (name of victim) was under 18 years of age and was not accompanied by a parent.[4]

3. The defendant knew or should have known that (name of victim) was under the legal drinking age.

   The legal drinking age is 21 years of age.[5]

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In deciding whether the defendant knew or should have known that (name of victim) was under the legal drinking age, you should consider all the circumstances relating to the alleged providing of alcohol beverages, including any representations about age made by (name of victim).[6]

4. Name of victim) (died) (suffered great bodily harm) as a result of consuming alcohol beverages provided by the defendant.

This requires that the consumption of such alcohol beverages was a substantial factor[7] in causing (death) (great bodily harm) to (name of victim).

("Great bodily harm" means serious bodily injury.)[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5050 was originally published in 1989 and revised in 1995 and 2005. This revision was approved by the Committee in February 2007.

This instruction is drafted for violations of § 125.075, which was created by 1987 Wisconsin Act 335 (effective date: April 28, 1988).

1. Section 125.075(2) provides that the penalty for a violation of this statute varies depending on the harm suffered by the underage person:

- if the underage person suffers great bodily harm, the defendant is guilty of a Class H felony.
- if the underage person dies, the defendant is guilty of a Class G felony.

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2. The actual words used in statute are: "procures for . . . or sells, dispenses or gives away to. . . ." § 125.075(1). The instruction uses the broader term "provides," which is used in the title of the statute, and then defines it by reference to the statutory language.

3. This is the definition of "alcohol beverage" provided in § 125.02(1).

"Fermented malt beverage" is defined in § 125.02(6) as follows:

"Fermented malt beverages" means any beverage made by the alcohol fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing 0.5% or more of alcohol by volume.

"Intoxicating liquor" is defined in § 125.02(8) as follows:

"Intoxicating liquor" means all ardent, spirituous, distilled or vinous liquors, liquids or compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing 0.5% or more alcohol by volume, which are beverages, but does not include "fermented malt beverages."

4. Section 125.075 prohibits providing alcohol beverages "to a person under 18 years of age in violation of s. 125.07(1)(a) 1 or 2. . . ." The statutory cross-reference is to provisions prohibiting the dispensing of alcohol beverages to an "underaged person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age." Thus, it is the source of the requirement in the second element that the underaged person was not accompanied by a parent. The complete statement would be as set forth in the quotation above.

In State v. Wille, 2007 WI App 27, ___ Wis.2d ___, ___ N.W.2d ___ [No. 2005AP2839-CR, publication recommended], the court rejected the defendant's contention that § 125.075(1) applies "only when a defendant has had direct contact with a particular victim or otherwise knows of the specific victim for whom alcohol beverages are procured." ¶9. The court concluded that "a violation of § 125.075(1) is proven when a defendant is shown to have 'procure[d] alcohol beverages for . . . [one or more persons who are] under 18 years of age,' if the defendant 'knew or should have known that the underage person[s were] under the legal drinking age' and an 'underage person [who was under eighteen when provided the beverages] dies . . . as a result.'" ¶15.

5. Section 125.02(8m) provides that "'legal drinking age' means 21 years of age."

6. With respect to the "knew or should have known" requirement, § 125.075(1m) provides as follows:

(1m) In determining under sub. (l)(a) whether a person knew or should have known that the underage person was under the legal drinking age, all relevant circumstances surrounding the procuring, selling, dispensing or giving away of the alcohol beverages may be considered, including any circumstance under pars. (a) to (d). In addition, a person has a defense to criminal liability under sub. (1) if all of the following occur:

(a) The underage person falsely represents that he or she has attained the legal drinking age.

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(b) The underage person supports the representation under par. (a) with documentation that he or she has attained the legal drinking age.

(c) The alcohol beverages are provided in good faith reliance on the underage person's representation that he or she has attained the legal drinking age.

(d) The appearance of the underage person is such that an ordinary and prudent person would believe that he or she had attained the legal drinking age.

The instruction suggests a statement that calls the jury's attention to the general caveat of subsection (1m) and to the specific concern to which subsections (a) through (d) relate—representations as to age made by the underage person. Because the definition of the crime includes a "knew or should have known" element, any evidence tending to show the absence of that element must be considered by the jury. In addition, a more specific defense is provided by subsections (a) through (d). If the defendant presents evidence of each of the matters set forth in subsection (a) through (d), the Committee recommends that the jury be instructed that the state must prove that the defense does not apply. This can be done by proving that any one of the four matters is not present. See City of Oshkosh v. Abitz, 187 Wis.2d 202, 522 N.W.2d 258 (Ct. App. 1994), holding that a similar provision found in § 125.07 provided "two lines of defense": introducing any evidence believed relevant to challenging the element of the offense; and, providing evidence of all four aspects of the specific defense.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

The Committee has treated this offense as one involving the traditional "substantial factor" causal relationship employed for criminal offenses. However, it should be noted that § 125.075 does not directly refer to the defendant's conduct causing the harm. Rather, the statute refers to the harm occurring "as a result of consuming the alcohol beverages provided" in violation of the statute § 125.075(1)(b). Since it is not clear whether this approach was intended to indicate a different causal requirement, the Committee concluded that the regular "substantial factor" test should be used.

This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3). The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

In State v. Wille, 2007 WI App 27, ___ Wis.2d ___, ___ N.W.2d ___ [No. 2005AP2839-CR, publication recommended], the court concluded that the instruction was correct in adopting the "substantial factor"

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factor" standard for the cause element. ¶26. The court also concluded that the trial court did not err in denying a request to add that the death must have been a "natural and probable consequence" of the defendant's conduct. "[I]t is not an erroneous exercise of discretion for a trial court to decline to provide jurors with alternative language that communicates the same concept as other language already included in the instruction." ¶27.

8. For additional definition and discussion of "great bodily harm," see Wis JI-Criminal 914.

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5200 STORING, TREATING, TRANSPORTING, OR DISPOSING OF HAZARDOUS WASTE WITHOUT A LICENSE – § 291.97(2)(b)

Statutory Definition of the Crime

Section 291.97(2)(b) of the Wisconsin Statutes is violated by one who willfully stores, treats, transports, or disposes of any hazardous waste without a license required under section 291.23 or 291.25.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (stored) (treated) (transported) (disposed of) hazardous waste.

   (Name of substance) is a hazardous waste.[2]

   ["Stored" means the containment of hazardous waste for a temporary period in a manner that does not constitute disposal.][3]

   ["Treated" means using any method, technique or process, including neutralization, which follows generation and which is designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize the hazardous waste or so as to render the waste nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume. It includes incineration.][4]

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["Transported" means moving hazardous wastes by air, rail, highway, water or other means (except for the movement of hazardous waste within the site at which the hazardous waste is generated or within a facility that is licensed)].[5]

["Disposed of" means the discharging, depositing, injecting, dumping, spilling, leaking or placing of any hazardous waste into or on any land or water in a manner which may permit the hazardous waste or any hazardous constituent to be emitted into the air, to be discharged into any waters of the state or otherwise to enter the environment. It does not include the generation, transportation, storage or treatment of hazardous waste.][6]

2. The defendant did not have a license[7] for the (storage) (treatment) (transportation) (disposal) of hazardous waste as required by section (291.23) (291.25).

[Storage of hazardous waste at the generation site by the generator of that waste for a period less than 90 days does not require a license.][8]

[Storage of hazardous waste for a period of less than 10 days in connection with the transporting or movement of the hazardous waste does not require a license.][9]

3. The defendant (stored) (treated) (transported) (disposed of) hazardous waste willfully.

"Willfully" requires that the defendant intentionally (stored) (treated) (transported) (disposed of) hazardous waste[10] and knew that the material had the potential to be harmful to others or to the environment.[11]

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[USE ANY OF THE FOLLOWING IF RAISED BY THE EVIDENCE.]

["Willfully" does not require that the defendant (knew that a license was required to carry on those activities)[12] (or) (knew that (he) (she) was violating any particular law) (or))knew that the material was defined by law to be a hazardous waste)].[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5200 was originally published in 1993. This revision was approved by the Committee in October 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for violations of § 291.97(2)(b), which are Class H felonies and subject to a fine of not more than $100,000. For a second or subsequent violation, the penalty increases to that for a Class F felony and a fine of not more than $150,000. § 291.97(2)(c)2.

The maximum penalties double "[i]f a person commits a violation in connection with an enterprise, as defined under s. 948.82(2)." § 291.97(2)(e). The reference is to the definition of "enterprise" in the Wisconsin Organized Crime Control Act (the Wisconsin version of the federal "RICO" statute). Note that the § 946.82(2) definition does not require that there be any illegal purpose for the enterprise.

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Each day of a continuing violation constitutes a separate offense. § 291.97(2)(d).

1. This instruction is drafted for one type of violation under § 291.97(b)2. That subsection applies not only to committing a prohibited act "without a license," but also to doing so "in violation of a rule promulgated or special order, plan approval or term or condition of a license or variance issued under s. 291.23, 291.25, 291.29, 291.31 or 291.87."

2. Section 291.01(7) provides that "'hazardous waste' or 'waste' means any solid waste identified by the department as hazardous under s. 291.05(1), (2), or (4)." Section 291.05(2) requires the Department of Natural Resources to promulgate by rule a list of hazardous wastes. The administrative rules relating to hazardous wastes are contained in Wis. Adm. Code sec. NR 661. Section 661.03 provides an extensive and highly detailed definition of "hazardous waste." To summarize, something is a "hazardous waste" if it is so labelled by the rules promulgated by the Department of Natural Resources. Further, whether a substance is a "hazardous waste" is a legal conclusion which the court may pass along to the jury. Whether the substance in the case actually was the substance defined by law as a "hazardous waste" is the factual issue that the jury must determine.

3. This is based on the definition of "storage" provided in § 291.01(18).

4. This is based on the definition of "treatment" provided in § 291.01(21).

5. This is based on the definition of "transport" provided in § 291.01(20).

6. This is based on the definition of "disposal" provided in § 291.01(3).

7. As described in note 1, supra, the instruction is drafted for the "without a license" violations covered by § 291.97(2)(b)2. Section 291.27(2)(b)2. refers to acts performed "without a license required under s. 291.23 or 291.25." Section 291.23 addresses licensing for the transportation of hazardous waste; § 291.25 addresses licensing for the treatment, storage or disposal of hazardous waste.

8. Section 291.25(1).

9. Section 291.25(1).

10. The mental element required for violations of § 291.97 [then § 144.72(2)(b)] was considered by the Wisconsin Court of Appeals in State v. Fettig, 172 Wis.2d 428, 493 N.W.2d 254 (Ct. App. 1992). The court concluded that the statute

> . . . does not require proof that one who wilfully stores or disposes of hazardous wastes also must know that a license is required to carry on those activities. We hold that the word 'wilfully' reaches only to '[s]tores, treats, transports or disposes of;' consequently, the state need prove only that any of those activities was done wilfully and that the person so acted without a license.

172 Wis.2d 428, 433.

11. This statement is based on the instruction used by the trial court in the Fettig case. See 172 Wis.2d 428, 435.

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12. See State v. Fettig, note 10, supra.

13. The last two statements in brackets are based on the instruction used by the trial court in the Fettig case. See 172 Wis.2d 428, 435.

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5301 ELECTION FRAUD — UNQUALIFIED ELECTOR — §§ 12.13(1)(a) and 12.60(1)(a)

Statutory Definition of the Crime

Section 12.13(1)(a) is violated by a person who intentionally votes at any election if the person does not have the necessary elector qualifications and residence requirements.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant voted at an election.

2. The defendant did not have the necessary (elector qualifications) (residency requirements).

   In this case, it is alleged that the defendant did not (identify the qualification or requirement that the defendant allegedly lacked).[1]

3. The defendant acted intentionally.[2]

   This requires that the defendant knew (he) (she) did not have the necessary (elector qualifications) (residency requirements).

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Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5301 was approved by the Committee in October 2008.

Election fraud offenses are defined in § 12.13. Penalties are set forth in § 12.60. Violations of § 12.13(1) are Class I felonies.

1. The following statutes provide general qualifications and requirements for electors: § 6.02 Qualifications, general; § 6.02 Disqualification of electors; and, § 6.10 Elector residence.

2. Sec. 12.02 Construction, provides: "In this chapter, criminal intent shall be construed in accordance with s. 939.23." As applied to this offense, the s. 939.23(3) definition of "intentionally" requires that the defendant had the mental purpose to vote and knew that he or she lacked the necessary elector qualifications or residence requirements.

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5401 CARRYING A WEAPON BY LICENSEE WHERE PROHIBITED — § 175.60(16)

Statutory Definition of the Crime

Section 175.60(16) of the Wisconsin Statutes provides that it is unlawful for any (licensee) (out-of-state licensee) to knowingly carry (a concealed weapon) (a weapon that is not concealed) (a firearm that is not a weapon) in a place where carrying a weapon is prohibited.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (a licensee) (an out-of-state licensee).

   ("Licensee" means an individual holding a valid license to carry a concealed weapon issued under section 175.60 of the Wisconsin Statutes.)[1]

   ("Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out of state license to carry a concealed weapon.)[2]

2. The defendant knowingly carried (a concealed weapon) (a weapon that is not concealed) (a firearm that is not a weapon).

   "Carried" means "went armed with."[3]

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The phrase "went armed" means that the (weapon) (firearm) must have been either on the defendant's person or that the (weapon) (firearm) must have been within the defendant's reach.[4]

"Knowingly" requires that the defendant knew the (weapon) (firearm) was on (his) (her) person or within (his) (her) control.

["Concealed" means hidden from ordinary observation. The weapon does not have to completely hidden.][5]

["Weapon" means (a handgun) (an electric weapon) (a knife other than a switchblade knife) (a billy club).][6]

FOR CASES INVOLVING "A FIREARM THAT IS NOT A WEAPON" ADD THE FOLLOWING.

["A firearm that is not a weapon" means a firearm other than a handgun.

"Firearm" means a device that acts by the force of gunpowder.][7]

3. The defendant carried the (concealed weapon) (weapon that was not concealed) (firearm that was not a weapon) in (specify a place listed in § 175.60(16)(a) 1. through 8.) .[8]

Deciding About Knowledge

You cannot look into a person's mind to determine knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5401 was approved by the Committee in February 2012.

This instruction is for violations of § 175.60(16)(a) a statute created by 2011 Wisconsin Act 35. Effective date: November 1, 2011. The penalty is a fine of $500 or imprisonment for 30 days or both. See § 175.60(17)(b).

Note that this statute applies only to persons licensed to carry a concealed weapon by Wisconsin or by another state whose licensees are recognized in Wisconsin. Persons who are not licensees would be prosecuted under the regular criminal statutes, such as those prohibiting carrying a concealed weapon [§ 941.23] or carrying a firearm in a public building [§ 941.235].

Subsection (b) of § 175.60(16) provides that the "prohibitions under par. (a) do not apply to any of the following:

1. A weapon in a vehicle driven or parked in a parking facility located in a building that is used as, or any portion of which is used as, a location under par. (a).
2. A weapon in a courthouse or courtroom if a judge who is a licensee is carrying the weapon or if another licensee or out-of-state licensee, whom a judge has permitted in writing to carry a weapon, is carrying the weapon.
3. A weapon in a courthouse or courtroom if a district attorney, or an assistant district attorney, who is a licensee is carrying the weapon."

1. This is the definition of "licensee" provided in § 175.60(1)(d).

2. This is the definition of "out-of-state licensee" provided in § 175.60(1)(g), with the addition of the last phrase: "to carry a concealed weapon." "Out of state license" is defined in § 175.60(1)(f).

3. Section 175.60(1)(ag) defines "carry" as "to go armed with."

4. See footnote 4, Wis JI-Criminal 1335 for an explanation of the derivation of the definition of "went armed."

5. This is the definition of "concealed" used in Wis JI-Criminal 1335, Carrying A Concealed Weapon. It is to be included in the instruction only if the "concealed weapon" option is selected for the second element.

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6. This is the definition of "weapon" provided in § 175.60(1)(j).

"Handgun" is defined as follows in § 175.60(1)(bm): ". . . any weapon designed or redesigned, or made or remade, and intended to be fired while held in one hand and to use the energy of any explosive to expel a projectile through a smooth or rifled bore. 'Handgun' does not include a machine gun, as defined in s. 941.27(1), a short-barreled rifle, as defined in s. 941.28(1)(b), or a short-barreled shotgun, as defined in s. 941.28(1)(c)."

"Electric weapon" is defined in § 941.295(1c)(a).

7. Section 175.60(16)(a) refers to three categories of weapons: a concealed weapon; a weapon that is not concealed; and, a firearm that is not a weapon. "Weapon" is defined in § 175.60(1)(j) as a handgun, electric weapon, a knife other than a switchblade, or a billy club. "Handgun" is defined in § 175.60(1)(bm) to exclude machine guns and short-barreled rifles or shotguns. [See footnote 6, which contains the complete definition.] The latter would still qualify as firearms, because they operate by force of gunpowder. Thus, in the Committee's judgment, the statutory reference to "a firearm that is not a weapon" would include machine guns and short-barreled rifles or shotguns.

The definition of firearm is the standard one used in the instructions [see Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892)], modified to refer to "device" in place of the usual reference to "weapon."

8. Section 175.60(16)(a) prohibits carrying a weapon or a firearm that is not a weapon in the following places.

1. Any portion of a building that is a police station, sheriff's office, state patrol station, or the office of division of criminal investigation special agent of the department.
2. Any portion of a building that is a prison, jail, house of correction, or secured correctional facility.
3. The facility established under s. 46.055. [The secure mental health facility for sexually violent persons.]
4. The facility established under s. 46.056. [The Wisconsin Resource Center.]
5. Any secured unit or secured portion of a mental health institute under s.51.05, including a facility designated as the Maximum Security Facility at Mendota Mental Heath Institute.
6. Any portion of a building that is a county, state, or federal courthouse.
7. Any portion of a building that is a municipal courtroom if court is in session.
8. A place beyond a security checkpoint in an airport.

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6000 NOTE ON THE KNOWLEDGE REQUIREMENT IN CONTROLLED SUBSTANCE CASES

The statutes defining controlled substance offenses typically do not contain a mental element. For example, § 961.41(1) provides simply that "it is unlawful for any person to manufacture, distribute or deliver a controlled substance . . ." In interpreting these statutes, courts have held that it must be proved that persons charged "knew or believed" that the substance they delivered, manufactured, or possessed was a controlled substance. This note discusses some of the issues that arise in trying to apply this knowledge requirement.

The Source of the Knowledge Requirement

The source of the knowledge requirement in Wisconsin is State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). The court held that under § 161.30(12)(d) (1969 Wis. Stats.) [now § 961.30(12)(d)], "the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. The 1969 statute under which Christel was charged contained no specific knowledge requirement, but the court cited two authorities in a footnote to the phrase quoted above: Wis JI-Criminal 6030 (and cases cited therein); and a federal case, Wright v. Edwards, 470 F.2d 980 (5th Cir. 1972).

Wis JI-Criminal 6030, as it existed in 1973, required that the defendant "knew or believed that the substance he possessed was (name controlled substance)." The cited authorities for this conclusion were other instructions where "possession" was an element: Wis JI-Criminal 1481 Receiving Stolen Property; and Wis JI-Criminal 1417 Possession Of A Firebomb. Note 2 to Wis JI-Criminal 1417 is especially relevant: "[The offense] . . . appears to be strict liability, but 'possession' carries with it a connotation of 'knowing or conscious possession.'"

In Wright v. Edwards, cited above, the issue was whether a state statute simply prohibiting the "possession of marijuana" included an element of criminal intent or guilty knowledge. The court held that while intent in the traditional common law sense of a guilty mind is not a constitutional requisite under a statute of this type, due process demands that the State show a specific intent to possess the prohibited substance, that is, that the act was purposely, not accidentally done.

Wisconsin cases since Christel have reaffirmed the knowledge requirement without discussing it in detail. See, for example, Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978); Kabat v. State, 76 Wis.2d 224, 251 N.W.2d 38 (1977); State v. Smallwood, 97

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Wis.2d 673, 294 N.W.2d 51 (Ct. App. 1980); and, State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

The Wisconsin Supreme Court revisited the issue in State v. Sartin, 200 Wis.2d 47, 546 N.W.2d 499 (1996). Sartin was a passenger in a car in which bags of cocaine and cocaine base were found. He admitted accepting money to transport the bags and knowing that what they contained was "probably illegal," but denied knowing they contained cocaine. He claimed that the trial court erred in not instructing the jury that the state must prove he knew the bags contained cocaine. The Wisconsin Supreme Court summarized the history of the knowledge requirement as described above and reaffirmed the rule expressed in the cited cases:

> . . . [t]he only knowledge that the State must prove . . . is the defendant's knowledge or belief that the substance was a controlled or prohibited substance. The State is not required to prove the defendant knew the exact nature or precise chemical name of the substance. . . The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. People v. James, 348 N.E.2d 295, 298 (Ill. App. 1976). We find that it would be unreasonable to assume that the legislature intended that the State prove that the accused knew the exact nature or chemical name of the controlled substance. 200 Wis.2d 47, 61.

The court in Sartin also addressed some of the potential problems that have been outlined in this note. See the discussion below.

Two Aspects To The Knowledge Requirement

The cases from Christel through Sartin suggest some of the potential problems that arise in trying to apply the knowledge requirement. The requirement appears to have two different aspects: 1) knowing, conscious possession as opposed to accidental, unknowing possession; and, 2) knowing the nature of the substance knowingly possessed or delivered. [This analysis, contained in an earlier version of this Note, was cited with apparent approval in State v. Sartin, 200 Wis.2d 47, 54 (at note 3), 546 N.W.2d 449 (1996).]

1) Knowing, conscious, possession or delivery

This aspect of the problem appears to be straightforward and is most clearly raised in possession cases. It may arise where the amount of substance possessed is so small that there may be doubt whether the defendant knew it was in his possession at all. The Kabat case, cited above, is an illustration of this problem. Kabat's conviction for possession of marijuana

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rested on the presence of marijuana ash and residue in a pipe. The Wisconsin Supreme Court reversed the conviction on the ground that the presence of such a small amount of material was not a sufficient basis upon which to base a finding that the defendant was in "knowing possession."

[Note: Kabat does not require that there be a "usable amount" as a basis for a possession conviction. Possession of any amount is sufficient to support a conviction as long as that possession is "knowing." See Fletcher v. State, 68 Wis.2d 381, 228 N.W.2d 708 (1975), and State v. Dodd, 28 Wis.2d 643, 137 N.W.2d 465 (1965). Also see, Peasley v. State, 83 Wis.2d 224, 265 N.W.2d 506 (1978): possession of 1/3 gram of cocaine was sufficient, in light of all the evidence, to support a finding of possession with intent to deliver.]

Other examples which illustrate this aspect of the problem are the person with flakes of marijuana in a pants cuff; the person who has been set up by the concealment of narcotics in his or her clothing; or the person who has received an unsolicited and unexpected package or marijuana in the mail. It is the same issue addressed by the previously cited footnote to Wis JI-Criminal 1417: the use of the word "possession" carries with it a connotation of "knowing or conscious possession." [See Wis JI-Criminal 920 for discussion of cases reaffirming this interpretation.]

The same type of reasoning applies in delivery cases with even greater force — implicit in the word "delivery" is knowledge of the material being transferred. In the judgment of the Committee, "delivery" is used in the sense of "intentional transfer of knowing possession."

2) Knowledge of the nature of the substance (knowingly) possessed

The second aspect of the knowledge problem is more troublesome. When the defendant John Smith knows he has a substance in his pocket, what must he know about the identity of that substance? State v. Sartin, cited above, confirmed the basic rule of the Christel-Kabat-Lunde-Smallwood line of cases that defendants need not know the scientific name or the precise nature of the substance as long as they know the substance is a "controlled substance."

Unlike most definitions of terms used in the criminal law, the definition of "controlled substance" does not use general or descriptive terms. "Controlled substance" is defined in § 961.01(4) as ". . . a drug, substance or immediate precursor included in schedules I to V of subch. II." The definition simply says that a "controlled substance" is any substance listed in the statutory schedules. Literal application of the knowledge requirement to the statutory definition would seem to require knowledge that the substance was listed in the schedules, yet few people are likely to be familiar with the complicated chemical names that appear in

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those schedules. And the cases (see, for example, Lunde and Smallwood, cited above) hold that knowledge of the chemical name is not required.

In many cases, there will be no dispute about the defendant's knowledge of the nature of the substance, as in cases involving sales to an undercover officer where the defendant has offered to sell a particular substance to the officer. In other cases, the State may undertake to prove the defendant knew the precise nature of the substance. In such situations, the uniform instructions provide for using the name of the substance in the instructions.

In other cases, the facts may be unclear whether the defendant knew the nature of the substance possessed or delivered. One possible case is where the defendant believes he or she possesses one substance (for example, heroin) but actually possesses another (for example, morphine). In that case, the defendant may be found guilty since both substances are controlled.

If the defendant is honestly mistaken about the controlled or illegal nature of the substance, a different result may follow. For example, where the defendant honestly believes the substance to be caffeine, not a controlled substance, and it is actually heroin, the mistake can be a defense because it negatives the state of mind required for the crime — knowledge or belief that the person possessed a controlled substance.

Knowing a Substance by a "Street Name"

Another common situation is one where the defendant knows the substance by a slang or street name and does not know its proper or chemical name. The uniform instructions provide that knowledge of the street name is sufficient if there is proof that the substance was in fact a controlled substance, that the name known to the defendant was the street name for that substance, and that the defendant did know the substance by the street name.

Mistake about the Schedule in Which a Substance Is Listed

State v. Sartin, cited above, resolved a potential problem presented by the case where the defendant believes the substance is a controlled substance, but believes it is, for example, a substance listed in Schedule IV, but it is in fact listed in Schedule I. The schedule determines the penalty and there can be a substantial difference in the penalty between offenses involving Schedule I and Schedule IV substances. A decision of the Wisconsin Court of Appeals had suggested that where the difference in schedules results in different penalties, knowledge of the identity of the substance is required:

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> Knowledge as to the exact nature or chemical name of the controlled substance is necessary only when the evidence points to substances of different schedules and penalties. State v. Smallwood, 97 Wis.2d 673, 678.

Sartin held that the quoted provision was dicta ("unnecessary to the resolution of the issue before [the court] and therefore is not binding in subsequent cases as legal precedent):

> We expressly overrule any language in Smallwood which suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

Proof of the Knowledge Element

Establishing the mental element in a controlled substance case, like proving intent in any criminal prosecution, can be difficult to accomplish without using circumstantial evidence. In cases where the mental element is disputed, all the circumstances surrounding the incident will be relevant. Section 961.41(1m) offers guidance as to the types of facts that may be present:

> Intent under this subsection [intent to manufacture, distribute or deliver] may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

Facts of this type may be relevant in any case where the mental element is contested.

In State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990), the defendant was charged with possession of cocaine based on residue in the threads of the cap to a small glass vial. She maintained that she knew the vial had once contained cocaine, but thought it was empty at the time of the arrest. The court reaffirmed that the state must prove that the defendant knew she possessed a controlled substance and found that there was a reasonable basis in the evidence for such a finding by the jury:

> The jury could reasonably infer that the defendant looked at the vial when replacing its cap, saw the white powder residue on the threads holding the cap, and therefore, knew that there was cocaine residue on the vial at the time of her arrest.

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Alternatively, the jury could conclude that unless one takes extraordinary measures to remove the contents of a bottle after all usable amounts are gone, some of the contents will remain behind . . . [T]he jury could reasonably infer that the defendant knew that the vial contained residual amounts of cocaine at the time of her arrest. 153 Wis.2d 493, 509.

COMMENT

Wis JI-Criminal 6000 was originally published in 1981 and revised in 1996. This revision, which involved adopting a new format, was approved by the Committee in October 2009.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

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6001 FINDING THE AMOUNT OF CONTROLLED SUBSTANCE

ADD THE FOLLOWING TO INSTRUCTIONS FOR CASES INVOLVING THE MANUFACTURE, DISTRIBUTION, OR DELIVERY OF A CONTROLLED SUBSTANCE OR THE POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DELIVER, WHERE THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE AMOUNT POSSESSED EXCEEDED THE REQUIRED AMOUNT[1]:

If you find the defendant guilty, you must answer the following question(s)[2] "yes" or "no":

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it,[3] more than (state amount which determines the penalty)?[4]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

If you are not so satisfied, you must answer the question "no."

IF THERE IS A REASONABLE BASIS IN THE EVIDENCE FOR FINDING THAT A LARGER AMOUNT WAS NOT ESTABLISHED AND THAT A SMALLER AMOUNT WAS, ADD THE FOLLOWING AND REPEAT IF NECESSARY.

If you answer the first question "no," you must answer the following question "yes" or "no":

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which determines the penalty)?

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Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6001 was originally published in October 1986 and revised in 1989, 1991, 1992, 1996, and 2010. The 2010 revision adopted a new format and updated the Comment. This revision was approved by the Committee in April 2018; it added a model for submitting more than one question regarding the amount involved.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

This instruction provides for a jury finding of the amount of controlled substance involved in offenses under Chapter 961. It is modeled after the instruction for finding value in theft cases. See Wis JI-Criminal 1441A. See Wis JI-Criminal 6001A EXAMPLE for an adaptation of this instruction for methamphetamine cases.

The penalty-depending-upon-weight provision originally applied to cocaine offenses only but was expanded to cover other substances in 1989. (See 1987 Wisconsin Act 339.) The amounts vary depending on the kind of controlled substance. Because many variables are involved, the Committee decided to revise this instruction to provide a general framework into which the proper amounts must be inserted.

The following statutes provided for penalties based on the amount of controlled substance involved: § 961.41(1), subsections (cm) through (im), for manufacture, distribution, or delivery offenses; and § 961.41(1m), subsections (cm) through (im), for offenses involving possession with intent to manufacture, distribute, or deliver. Under each statute, the subsections deal with the same substances: (cm) cocaine and cocaine base; (d) heroin; (e) phencyclidine, amphetamine, methamphetamine, et al.; (em) synthetic cannabinoids; (f) lysergic acid diethylamide; (g) psilocin or psilocybin; (h) tetrahydrocannabinols; (hm) certain other Schedule 1 controlled substances and ketamine; and, (im) flunitrazepam.

Sections 961.41(1)(h) and (1m)(h) include penalty grades based on the number of plants containing tetrahydrocannabinols possessed. In such cases, the reference in the question would have to be changed to refer to the number of plants rather than the "amount of" substance.

The Committee suggests the following as an addition to the guilty verdict form:

(Answer the following "yes" or "no"):

> Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which determines the penalty)?

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1. The Committee concluded that it was preferable to state the question in terms of whether the required amount is present rather than to ask the jury to agree on a specific amount. Requiring agreement might cause a delay in reaching a verdict that is not related to any essential issue.

The Committee also concluded that it is not necessary to include the upper threshold – e.g., "but not more than 10 grams" – to avoid unnecessary jury debate about whether or not the upper threshold was exceeded.

2. It may be appropriate to submit more than one question if there is a reasonable basis for finding that a larger amount was not established and that a smaller amount was established (as in a lesser included offense situation).

3. With regard to determining the amount of the controlled substance, § 961.41(1r) provides as follows:

> 961.41(1r) In determining amounts under . . . subs. (1) and (1m), an amount includes the weight of the [controlled substance or controlled substance analog] . . . together with any compound, mixture, diluent, plant material, or other substance mixed or combined with the controlled substance or controlled substance analog.

In Chapman v. United States, 500 U.S. 453 (1991), the United States Supreme Court reviewed federal sentencing provisions that are similar to § 961.41(1r) in including the weight of material mixed or combined with the controlled substance. The Court held that the sentencing provisions were constitutional in the context of a case where the weight of the blotter paper containing LSD, not the weight of the pure LSD alone, was used to determine the amount for sentencing purposes.

"Stems or branches supporting the marijuana leaves or buds . . . are not excluded as 'mature stalks'" under the definition of "controlled substance" in § 961.01(14). State v. Martinez, 210 Wis.2d 396, 412-13, 563 N.W.2d 922 (Ct. App. 1997).

4. If the case involves possession with intent to manufacture or deliver, the Committee recommends restating this sentence as follows: "Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, possessed with intent to (manufacture) (deliver) more than _____?" The purpose is to avoid any argument that the necessary amount was simply possessed as opposed to being possessed with intent to deliver. Simple possession is not subject to the added penalties addressed by this instruction.

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6001A EXAMPLE FINDING THE AMOUNT OF CONTROLLED SUBSTANCE IN A METHAMPHETAMINE CASE

ADD THE FOLLOWING TO INSTRUCTIONS FOR CASES INVOLVING THE MANUFACTURE, DISTRIBUTION, OR DELIVERY OF METHAMPHETAMINE OR THE POSSESSION OF METHAMPHETAMINE WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DELIVER,[1] WHERE THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE AMOUNT POSSESSED EXCEEDED THE REQUIRED AMOUNT:

If you find the defendant guilty, you must answer the following question "yes" or "no":

Was the amount of methamphetamine, including the weight of any other substance or material mixed or combined with it, more than 50 grams?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than 50 grams.

If you are not so satisfied, you must answer the question "no."

IF THERE IS A REASONABLE BASIS IN THE EVIDENCE FOR FINDING THAT THE LARGER AMOUNT WAS NOT ESTABLISHED AND THAT A SMALLER AMOUNT WAS, ADD THE FOLLOWING.

If you answer the first question "no," you must answer the following question "yes" or "no":

Was the amount of methamphetamine, including the weight of any other substance or material mixed or combined with it, more than 10 grams?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than 10 grams.

If you are not so satisfied, you must answer the question "no."

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IF THERE IS A REASONABLE BASIS IN THE EVIDENCE FOR FINDING THAT THE LARGER AMOUNT WAS NOT ESTABLISHED AND THAT A SMALLER AMOUNT WAS, ADD THE FOLLOWING.

If you answer the second question "no," you must answer the following question "yes" or "no":

Was the amount of methamphetamine, including the weight of any other substance or material mixed or combined with it, more than 3 grams?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than 3 grams.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6001A was approved by the Committee in April 2018; it provides an example for how Wis JI-Criminal 6001 would be adapted for a methamphetamine case.

Penalties for manufacture, distribution, or delivery of methamphetamine are found in § 161.41(1)(e):

- three grams or less – Class F felony
- more than 3 grams but not more than 10 – Class E felony
- more than 10 grams but not more than 50 – Class D felony
- more than 50 grams – Class C felony

The questions in this instruction begin with the highest amount and then work down, in a lesser included offense type of approach. The Committee concluded that a question about the amount is not required for the "3 grams or less" case – the offense instruction will have required that some amount of methamphetamine was involved. The Committee also concluded that it is not necessary to include the upper threshold – e.g., "but not more than 10 grams" – to avoid unnecessary jury debate about whether or not the upper threshold was exceeded.

For commentary and footnotes relating to finding the amount in controlled substance cases, see Wis JI-Criminal 6001.

1. If the case involves possession with intent to manufacture or deliver, the Committee recommends restating this sentence as follows: "Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, possessed with intent to (manufacture)

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(deliver) more than _____?" The purpose is to avoid any argument that the necessary amount was simply possessed as opposed to being possessed with intent to deliver or manufacture. Simple possession is not subject to the added penalties addressed by this instruction.

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6002 DELIVERING A CONTROLLED SUBSTANCE TO A MINOR — § 961.46

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant delivered[1] (name controlled substance)[2] but also that the defendant was 17 years of age or over and delivered[3] (name controlled substance) to a person who was 17 years of age or under and who was three years younger than the defendant.

If you find the defendant guilty, you must answer the following three questions:[4]

"Was the defendant 17 years of age or over at the time of the delivery?"

"Did the defendant deliver (name controlled substance) to a person who was 17 years of age or under?"

"Was that person at least three years[5] younger than the defendant?"

Before you may answer a question "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied as to any question, you must answer that question "no."

COMMENT

Wis JI-Criminal 6002 was originally published in 1991 and revised in 1996. This revision was approved by the Committee in February 2003 and involved adding reference to 2001 Wisconsin Act 109 to the comment.

Section 961.46 was revised by 2001 Wisconsin Act 109, effective date: February 1, 2003. The penalty-increasing provision was simplified to provide for an increase in the applicable maximum term of imprisonment of not more than 5 years.

1. Section 961.46 provides increased penalties for "violations of § 961.41(1)" which involve delivering or distributing a controlled substance to a child. Section 961.41(1) prohibits delivering, distributing or

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manufacturing a controlled substance. The instruction is drafted for cases involving delivery. "Distributing" means "delivery", see note 3, below. "Manufacturing" alone is not enough; the penalty increase applies only where there is delivery or distribution.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving the named substance. It is the nature of the substance that determines the applicable penalty, and it is that penalty which is increased by the facts addressed by this instruction. Section 961.46 also applies to delivery of a "controlled substance analog." For cases involving "analogs," see Wis JI-Criminal 6005.

3. Section 961.46 refers to "distributing or delivering" a controlled substance to a child. The instruction uses "deliver" instead because the Committee concluded that most cases were likely to involve a delivery. Further, § 961.01(9) defines "distribute" as follows: "to deliver other than by administering or dispensing a controlled substance." "Administer" and "dispense" are defined in §§ 961.01(1) and (7), respectively, to refer to activities of "practitioners," further defined in § 961.01(19) as doctors, pharmacists, etc. Thus, "distribute" means "deliver."

4. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of three questions. The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.

If you find the defendant guilty, answer the following questions "yes" or "no":

"Was the defendant 17 years of age or over at the time of the delivery?"

"Did the defendant deliver (name controlled substance) to a person who was 17 years of age or under?"

"Was that person at least three years younger than the defendant?"

5. The Committee concluded that "three years" refers to a period of 36 months.

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6003 DELIVERING A CONTROLLED SUBSTANCE TO A PRISONER — § 961.465

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant delivered[1] (name controlled substance)[2] but also that the defendant delivered[3] (name controlled substance) to a prisoner.

If you find the defendant guilty, you must answer the following question:[4]

"Did the defendant deliver (name controlled substance) to a prisoner [within the precincts of a (prison) (jail) (house of correction)]?"[5]

ADD THE FOLLOWING ONLY IF "PRECINCTS" ARE INVOLVED:

["Precinct" means a place where any activity is conducted by a (prison) (jail) (house of correction).][6]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance) to a prisoner[7] [within the precincts of a (prison) (jail) (house of correction)].

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6003 was originally published in 1990 and revised in 1996. This revision was approved by the Committee in February 2003.

Section 961.465 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. Wis JI-Criminal 6003 is to be used only for charges based on conduct occurring before that date. The facts

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formerly addressed by § 961.465 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(8).

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

Section 961.465 provides for increased penalties for a "person who violates § 961.41(1) or (1m) by delivering or possessing with intent to deliver or distribute a controlled substance or controlled substance analog to a prisoner within the precincts of any prison, jail, or house of correction." § 961.465(1). Subsection (2) of § 961.465 doubles the "applicable minimum and maximum fines and minimum and maximum periods of imprisonment" for violations of § 961.41(1) or (1m) involving "cocaine, cocaine base, heroin, phencyclidine, lysergic acid diethylamide, psilocin, psilocybin, amphetamine, methamphetamine, methalinone, or any form of tetrahydrocannabinols." Subsection (1) applies the regular fine and doubles the possible maximum term of imprisonment for offenses involving any other controlled substance or analog not specified in subsection (2).

Both subsections apply to violations of § 961.41(1) and (1m). Section 961.41(1) applies to the manufacture, distribution, or delivery of a controlled substance. See Wis JI-Criminal 6020 and 6021. Section 961.41(1m) applies to possession of a controlled substance with intent to manufacture, distribute, or deliver. See Wis JI-Criminal 6035 and 6036. Both subsections of § 961.465 also apply to violations accomplished by delivering or distributing a controlled substance to a prisoner or by possessing a controlled substance with intent to deliver or distribute to a prisoner.

1. The underlying offense can be a violation of either § 961.41(1) — manufacture, distribution, or delivery of a controlled substance — or § 961.41(1m) — possession of a controlled substance with intent to deliver, distribute, or manufacture. This instruction uses "delivery"; it would need to be changed if one of the other alternatives was the basis for the underlying charge.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving the named substance. It is the nature of the substance that determines the applicable penalty and it is that penalty which is increased by the facts addressed by this instruction.

3. This instruction is drafted for a case where there was an actual delivery of a controlled substance to a prisoner. The statute also applies, however, to possession of a controlled substance with intent to deliver or distribute to a prisoner. See the comment preceding note 1, supra.

4. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

If you find the defendant guilty, answer the following question "yes" or "no":

> "Did the defendant deliver (name controlled substance) to a prisoner [within the precincts of a (prison) (jail) (house of correction)]?"

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5. The Committee suggests including the reference to "precincts" only where the case involves an alleged delivery outside the prison or jail proper.

6. This is the definition of "precincts" provided by § 961.465(3). Also see State v. Cummings, 153 Wis.2d 603, 451 N.W.2d 463 (Ct. App. 1989), where the court invoked the precinct rationale in the case of a prisoner who was receiving medical treatment in a hospital outside the prison.

7. If a definition of "prisoner" is needed, the Committee suggests the following which is adapted from the one used in Wis JI-Criminal 1222: "A prisoner is one who is confined to a (prison) (jail) (house of correction) as a result of a violation of law." It is based on the discussion in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), cited with approval in In Interest of C.D.M., 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985). Also see note 1, Wis JI-Criminal 1222. The term "prisoner" is also defined in § 46.011(2) for purposes of chapters 46 to 51, 55, and 58, and in § 301.01(2) for purposes of chapters 301 to 304.

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6004 DELIVERING A CONTROLLED SUBSTANCE ON OR NEAR CERTAIN PREMISES — § 961.49

[THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.]

The information alleges not only that the defendant delivered[1] (name controlled substance) [2] but also that the defendant delivered[3] (name controlled substance) while (on) (within 1,000 feet of) school premises.[4]

If you find the defendant guilty, you must answer the following question:[5]

"Did the defendant deliver (name controlled substance) while (on) (within 1,000 feet of) school premises?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance) while (on) (within 1,000 feet of) school premises.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6004 was originally published in December 1990 and revised in 1995, 1996, and 1999. This revision was approved by the Committee in August 2002. It updated the Comment and made editorial changes in the text.

Section 961.49 was amended by 2001 Wisconsin Act 109, but its basic penalty-enhancing provision was retained.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

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This instruction is for cases involving § 961.49, which provides for an increase of up to five years in the term of imprisonment for certain controlled substance offenses. It applies to violations of § 961.41(1) and (1m) committed "on or otherwise within 1,000 feet" of certain premises. Schools are the premises most commonly involved, but see note 4, below. Because the statute provides an enhanced penalty upon the finding of an additional fact, the Committee concluded that the additional fact is to be submitted to the jury. This is the same approach used for other penalty enhancers, see Wis JI-Criminal 990, Using a Dangerous Weapon, and Wis JI-Criminal 994, Concealing Identity.

Subsections (2) and (3) of § 961.49, which provided for sentences for "presumptive minimum" sentences were repealed by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

Section 961.495 applies to simple possession offenses committed within 1,000 feet of the same types of premises covered by § 961.49. It requires the sentencing court to impose 100 hours of community service work in addition to any other penalties imposed. This does not affect the penalty range and therefore does not present a factual issue for the jury.

In State v. Hermann, 164 Wis.2d 269, 474 N.W.2d 906 (Ct. App. 1991), the court refused to interpret the statute to include a mental element. That is, there is no requirement, express or implied, that the defendant know that the delivery is taking place within 1,000 feet of a school. The Hermann court also rejected a variety of constitutionally-based challenges to the statute.

The application of § 161.49 was discussed in State v. Rasmussen, 195 Wis.2d 109, 536 N.W.2d 106 (Ct. App. 1995). Rasmussen's vehicle was stopped for a traffic violation beyond the 1,000 foot zone, and a search disclosed 59 grams of cocaine in the defendant's purse. The trial court dismissed the enhancement provision, finding that the defendant was simply traveling between a tavern and her house when she passed within 1,000 feet of a school. The court of appeals reversed, holding that the evidence was sufficient to show that the defendant possessed cocaine with the intent to deliver and did so within the 1,000 foot zone; that is all that is required to support the application of § 161.49 (now §§ 961.49).

1. The underlying offense can be a violation of either § 961.41(1) — manufacture or delivery of a controlled substance — or § 961.41(1m) — possession of a controlled substance with intent to deliver or manufacture. This instruction uses "delivery"; it would need to be changed if one of the other alternatives was the basis for the underlying charge.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving the named substance. It is the nature of the substance that determines the applicable penalty, and it is that penalty which is increased by the facts addressed by this instruction.

3. This instruction is drafted for a case where there was an actual delivery of a controlled substance within 1,000 feet of the designated premises. The statute also applies, however, to possession of a controlled substance with intent to deliver. See the comment preceding note 1, supra.

4. The instruction is drafted for a case involving delivery "on or within 1,000 feet of school premises." This type of place is one of several covered by § 961.49. The list of premises in § 961.49(1) was amended by 1997 Wisconsin Act 327 [effective date: July 15, 1998] to read as follows:

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(a) While the person is in or on the premises of a scattered-site public housing project.
(b) While the person is in or on or otherwise within 1,000 feet of a any of the following:

1. A state, county, city, village or town park.
2. A jail or correctional facility.
3. A multiunit public housing project.
4. A swimming pool open to members of the public.
5. A youth center or a community center.
6. Any private or public school premises.
7. A school bus, as defined in s. 340.01(56).

(c) While the person is in or on the premises of an approved treatment facility, as defined in s. 51.01(2), that provides alcohol and other drug abuse treatment.
(d) While the person is within 1,000 feet of the premises of an approved treatment facility, as defined in s. 51.01(2), that provides alcohol and other drug abuse treatment, if the person knows or should have known that he or she is within 1,000 feet of the premises of the facility or if the facility is readily recognizable as a facility that provides alcohol and other drug abuse treatment.

"School" is not specially defined for purposes of § 961.49. In State v. Andrews, 171 Wis.2d 217, 491 N.W.2d 504 (Ct. App. 1992), the court referred to § 115.01 for a definition of "public school" and to § 118.165(1) for a definition of "private school." The court held that "a University of Wisconsin campus, such as at Oshkosh, does not fit either definition." 171 Wis.2d 217, 223. The court noted that 21 U.S.C. § 860 apparently served as a model for § 961.49. While the federal statute explicitly refers to colleges and universities, the Wisconsin counterpart does not. The court "presume[d] the difference in language reflects a deliberate choice. . . ." 171 Wis.2d 217, 224.

In State v. Hall, 196 Wis.2d 850, 540 N.W.2d 219 (Ct. App. 1995), the court held that the use of the word "premises" in § 961.49 does not make the statute unconstitutionally vague. The court concluded "that the statute provides fair warning that the region contemplated by the statute begins at the property line." 196 Wis.2d 850, 872-73.

A "daycare center" is a type of "youth center" to which § 961.49 applies. State v. Van Riper, 222 Wis.2d 197, 198, 586 N.W.2d 198 (Ct. App. 1998).

5. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant deliver (name controlled substance) while (on) (within 1,000 feet of) school premises?"

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6005 CONTROLLED SUBSTANCE ANALOG — § 961.01(4m)

[INSERT THE FOLLOWING IN INSTRUCTIONS FOR VIOLATIONS OF CHAPTER 961 INVOLVING "CONTROLLED SUBSTANCE ANALOGS."]

"Controlled substance analog" is a substance with a chemical structure substantially similar to[1] (name controlled substance included in Schedule I or II) [2] and

[which has a (stimulant), (depressant), (narcotic) (or) (hallucinogenic)[3] effect on the central nervous system substantially similar to the effect[4] of (name controlled substance included in schedule I or II)];[5] [or]

[which the defendant[6] represents or intends to have a (stimulant), (depressant), (narcotic) (or) (hallucinogenic)[7] effect on the central nervous system substantially similar to the effect of (name controlled substance included in schedule I or II)].[8]

COMMENT

Wis JI-Criminal 6005 was originally published in 1996. This revision adopted a new format and was approved by the Committee in October 2009.

The definition provided here for "controlled substance analog" is based on the one provided in § 961.01(4m)(a). The statute was created by 1995 Wisconsin Act 448 [effective date: July 9, 1996] which also renumbered Chapter 161 to Chapter 961 and extended all controlled substance violations to include "controlled substance analogs."

See Wis JI-Criminal 6020A for an example instruction building in the definition of "controlled substance analog." Note that other changes were necessary in the text of the instruction.

The statutory definition of "controlled substance analog" requires that the analog have a substantially similar chemical structure and that the analog either have a substantially similar effect or that the defendant intend or represent that it have a substantially similar effect.

The complete definition of § 961.01(4m) reads as follows:

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(a) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance included in schedule I or II and:

1. Which has a stimulant, depressant, narcotic, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, narcotic, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II; or

2. With respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, narcotic, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II.

(b) "Controlled substance analog" does not include:

1. A controlled substance.

2. A substance for which there is an approved new drug application;

3. A substance with respect to which an exemption is in effect for investigational use by a particular person under 21 USC 355 to the extent that conduct with respect to the substance is permitted by the exemption; or

4. Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

The Committee concluded that it was necessary to try to simplify this lengthy definition. See notes 1-8, below.

1. The instruction substitutes ". . . is a substance with a chemical structure substantially similar to . . ." for the statute's ". . . means a substance the chemical structure of which is substantially similar to the chemical structure of . . ." No change of meaning is intended.

2. The Committee recommends using the name of the controlled substance which the analog resembles, assuring that the controlled substance appears in Schedule I or II. Schedule I is found in § 961.14; Schedule II is found in § 961.16. With a name inserted, the first part of the definition would read as follows: "Controlled substance analog" is a substance with a chemical structure substantially similar to cocaine."

3. The Committee recommends selecting the effect or effects supported by the evidence. More than one effect may apply, but it appeared to be unlikely that all alternative would be applicable to a single substance.

4. The instruction uses "similar to the effect of" in place of the statute's "similar to the stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system of." No change of meaning is intended.

5. See note 2, supra.

6. The instruction substitutes the term "defendant" for the following phrase in the statute: "with respect to a particular individual, the individual . . ." The Committee reads the statutory definition as requiring either that the analog have a substantially similar effect or that the defendant represent or intend that the analog have a substantially similar effect. Some repetition in the statutory definition was also eliminated. See note 1, supra.

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7. See note 3, supra.

8. See note 2, supra.

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6009 POSSESSION OF A CONTROLLED SUBSTANCE WITHOUT TAX STAMP — § 139.95(2)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 6009 was originally published in 1982 and revised in 1996 and 2009. It was withdrawn in 2018.

This instructions was withdrawn because Subchapter IV of chapter 139 was repealed b 2015 Wisconsin Act 193. The effective date of the repeal is March 2, 2016.

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6020 DELIVERY OF A CONTROLLED SUBSTANCE — § 961.41(1)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to deliver[1] a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered a substance.

   "Deliver" means to transfer or attempt to transfer something from one person to another.[2]

2. The substance was (name controlled substance) .[3] (Name controlled substance) is a controlled substance whose delivery is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][4]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the

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defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to find knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6020 was originally published in 1981 and revised in 1990, 1992, 1996, 1999, and 2010. This revision was approved by the Committee in April 2018; it added a cross reference to Wis JI-Criminal 6001 to the Comment.

The penalty for offenses involving the delivery of a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

The 1996 revision addressed changes made by 1995 Wisconsin Act 448. [Effective date: July 9, 1996.] The primary changes were:

(1) renumbering the statute to § 961.41;
(2) adding "distributing" to the prohibited conduct; and
(3) extending the coverage of the statute to "controlled substance analogs."

The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing . . ." For offenses involving "manufacture, see Wis JI-Criminal 6021. For offenses involving a "controlled substance analog," see Wis JI-Criminal 6020A and 6005.

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It might be assumed the possession of a controlled substance is a lesser included offense of delivery of a controlled substance, but this may not be the case. In State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991), the court held that possession of a controlled substance is not a lesser included offense of reckless homicide as defined in § 940.02(2)(a). That homicide offense requires that the defendant "cause the death of another . . . by manufacture, distribution, or delivery of a controlled substance in violation of § 961.41. . . ." (Wis JI-Criminal 1021.) The Clemons court held that the strict statutory elements test for lesser included offenses was not satisfied because one can "deliver" without "possession," as where a doctor provides drugs to a person by writing an illegitimate prescription. 164 Wis.2d 506, 512. Apparently the same conclusion should apply to the delivery offense defined by this instruction.

1. Section 961.41(1) prohibits the delivery, distribution, or manufacture of a controlled substance. The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing . . ." For offenses involving "manufacture, see Wis JI-Criminal 6021. The penalty for the offense depends on the nature of the substance; see subsections (a)-(j) of § 961.41(1).

2. This definition was adapted from that found in § 961.01(6), which reads as follows:

> "Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance from this point on in the instruction. Whether the substance actually is the substance named and whether the defendant actually delivered the substance remain questions for the jury. The identity of a controlled substance may be proved without an expert, by circumstantial evidence. State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking

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to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

It is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

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6020A DELIVERY OF A CONTROLLED SUBSTANCE ANALOG — § 961.41(1); 961.01(4m)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to deliver a controlled substance analog.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered a substance.

   "Deliver" means to transfer or attempt to transfer something from one person to another.[1]

2. The substance was a controlled substance analog.

   [USE THE PARTS OF THE FOLLOWING DEFINITION THAT APPLY][2]

   "Controlled substance analog" is a substance with a chemical structure substantially similar to (name controlled substance included in Schedule I or II) [3] and

   [which has a (stimulant) (depressant) (narcotic) (or) (hallucinogenic) effect on the central nervous system substantially similar to the effect of (name controlled substance included in schedule I or II)];[4] [or]

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[which the defendant represents or intends to have a (stimulant) (depressant) (narcotic) (or) (hallucinogenic) effect on the central nervous system substantially similar to the effect of (name controlled substance included in schedule I or II)].[5]

3. The defendant knew or believed that the substance was a controlled substance analog.[6]

This requires two things: first, that the defendant knew or believed that the chemical structure of the substance was substantially similar to (name controlled substance) ; and, second that the defendant knew or believed that the (stimulant) (depressant) (narcotic) (or) (hallucinogenic) effect of the substance was substantially similar to the effect of (name controlled substance) .]

Deciding About Knowledge or Belief

You cannot look into a person's mind to find knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 6020A was originally published in 1996 and revised in 2010. This revision was approved by the Committee in April 2018; it added a cross reference to Wis JI-Criminal 6001 to the Comment.

The penalty for offenses involving the delivery of a controlled substance analog depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

1995 Wisconsin Act 448 [effective date: July 9, 1996] extended all controlled substance violations to include "controlled substance analogs." [Act 448 also renumbered Chapter 161 to Chapter 961.]

A separate instruction defining "controlled substance analogs" is provided at Wis JI-Criminal 6005. This instruction is a revision of Wis JI-Criminal 6020 to apply to an offense involving a controlled substance analog. Accomplishing this revision required more than a mechanical substitution of "controlled substance analog" for references to "a controlled substance," so the Committee concluded it was advisable to publish this as a model.

At least one important substantive question was raised: Since regular controlled substance offenses require knowledge that the substance is a controlled substance, does the analog offense require knowledge that the substance is a controlled substance analog? The Committee concluded that a knowledge element should be required and therefore is included as the third element.

1. This definition was adapted from that found in § 961.01(6), which reads as follows:

"Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

2. The text that follows is that of Wis JI-Criminal 6005. See that instruction for footnotes explaining the Committee's approach to the extensive statutory definition.

3. The Committee recommends using the name of the controlled substance which the analog resembles, assuring that the controlled substance appears in Schedule I or II. Schedule I is found in § 961.14; Schedule II is found in § 961.16. With a name inserted, the first part of the definition would read as follows: "Controlled substance analog" is a substance with a chemical structure substantially similar to cocaine."

4. See note 3, supra.

5. See note 3, supra.

6. The Committee concluded that since regular controlled substance offenses require a knowledge element, a similar element should be included here. See Wis JI-Criminal 6000 for a discussion of the knowledge element for regular controlled substance offenses. This instruction relates the knowledge element to one of the alternatives provided in the "controlled substance analog" definition: knowledge that the chemical structure is substantially similar and knowledge that the effect on the central nervous system is substantially similar. The former is always required; the latter can be replaced by the defendant representing

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or intending that the effect on the nervous system be substantially similar. If the latter alternative is used, no additional knowledge element appears to be required; it would be subsumed by the requirement that the defendant represent or intend that it have a similar effect on the central nervous system.

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6021 MANUFACTURE OF A CONTROLLED SUBSTANCE — § 961.41(1)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to manufacture a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant manufactured a substance.[1]

   "Manufacture" means to produce[2] a substance.

2. The substance was (name controlled substance).[3] (Name controlled substance) is a controlled substance whose manufacture is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

   IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, ADD THE FOLLOWING PARAGRAPH:

   [This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the

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defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge or belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6021 was originally published in 1985 and revised in 1989, 1994, 1996, and 2001. This revision was approved by the Committee in February 2010 and involved nonsubstantive changes in the text.

The penalty for offenses involving the manufacture of a controlled substance depend on the amount of substance involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

1. The instruction is drafted for what the Committee believes will be the most typical case — one that involves the manufacture of a substance. However, in State ex rel. Bell v. Columbia County, 82 Wis.2d 401, 263 N.W.2d 162 (1978), the supreme court held that it is the act of manufacturing that is prohibited; the state need not allege or prove that a controlled substance was actually manufactured or that the defendant possessed a manufactured controlled substance. Bell involved a challenge to the sufficiency of a complaint charging manufacture. The defendant possessed large quantities of everything needed to produce methamphetamine but none of the completed product was on the premises when the arrest took place. The defendant claimed the complaint was defective because it failed to allege that a controlled substance was actually produced. The supreme court rejected the claim.

For a case like Bell, the first element of the instruction should be modified to read as follows:

> 1. The defendant engaged in the act of manufacturing a substance. It is not required that a substance was actually produced.

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2. Subsection 961.01(13) provides a lengthy definition of "manufacture" that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses "produce" because the Committee concluded that it is likely to apply in the greatest number of cases. The complete definition in § 961.01(13) is as follows:

If there is a dispute about whether a particular action constitutes "manufacturing," a detailed definition is provided by § 961.01(13):

> "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:
>
> (a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
> (b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance because the Committee concluded that it adds clarity to use the name of the alleged substance throughout the instruction. Whether the substance actually is the substance named and whether the defendant actually manufactured the substance remain questions for the jury.

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

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While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

In a case involving delivery, it is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

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6030 POSSESSION OF A CONTROLLED SUBSTANCE — § 961.41(3g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a substance.

"Possessed" means that the defendant knowingly[2] had actual physical control of a substance.[3]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[A substance is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance.]

[It is not required that a person own a substance in order to possess it. What is required is that the person exercise control over the substance.]

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

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[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][4]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][5]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, ADD THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge or belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6030 was originally published in 1976 and revised in 1987, 1990, 1995, 1996, 1998, 2001, 2010, 2011, 2013, and 2014. This revision was approved in June 2014; it added to the Comment. In 2016, a revision was published to correct a nonsubstantive printing error in the comment.

A separate instruction addresses attempts to possess a controlled substance. See Wis JI-Criminal 6031.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

2011 Wisconsin Act 31 amended § 961.41(3g) by creating sub. (3g)(em) which prohibits possession of "a controlled substance specified in s. 961.14(4)(tb) to (ty)." Those substances are nonnarcotic, hallucinogenic substances commonly known as "synthetic cannabinoids." Act 31 classifies them as Schedule I substances. See footnote 1.

Possession of THC becomes a felony if the offender has a prior drug conviction. See § 961.48(2). The prior conviction is not an element of the felony possession offense and the state is not required to prove the prior offense beyond a reasonable doubt at trial. State v. Miles, 221 Wis.2d 56, 584 N.W.2d 703 (Ct. App. 1998). The court characterized this penalty enhancing provision as one that is not concerned with the factual circumstances surrounding the underlying crime and that does not change the substantive nature of the charged offense. Enhancers of that type do become an element subject to jury determination. Repeater provisions like the one involved in the Miles case are in a different group.

The definition of possession offenses provided in § 961.41(3g) provides that no person may possess a controlled substance or analog "unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription . . ." The instruction does not include an element requiring that there be no prescription because the Committee concluded that this issue is properly handled in the same manner as other statutory exceptions. For example, the offense of carrying concealed weapon applies to "any person except a peace officer." § 941.23. The Wisconsin Supreme Court has concluded that whether the defendant is a peace officer, and thus exempted from the statute, is an issue that must be raised by the defendant as an affirmative defense. See State v. Williamson, 58 Wis.2d 514, 524, 206 N.W.2d 613 (1973), and the discussion in footnote 1, Wis JI-Criminal 1335.

Factual disputes about the applicability of the exception for valid prescriptions would likely be determined by pretrial motion. If a factual dispute is raised at trial, the Committee concluded that it is not an issue in the case until there is some evidence of the existence of a valid prescription. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. The penalty for possession offenses varies with the type of substance possessed. The penalties are set forth in the following subsections of § 961.41(3g):

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(3g)(am) —	a controlled substance classified in Schedule I or II which is a narcotic drug
(3g)(b) —	a controlled substance other than one classified in Schedule I or II which is a narcotic drug [except as provided in subs. (3g)(c) to (g))]
(3g)(c) —	cocaine or cocaine base
(3g)(d) —	lysergic acid diethylamide, phencyclidine, amphetamine, methcathinone, methylenedioxypyrovalerone, 4-methylmethcathinone, psilocin or psilocybin
(3g)(e) —	tetrahydrocannabinols
(3g)(em) —	synthetic cannabinoids
(3g)(f) —	gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine or flunitrazepam
(3g)(g) —	methamphetamine

The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance throughout the instruction. Whether the substance actually is the substance named and whether the defendant actually possessed the substance remain questions for the jury.

2011 Wisconsin Act 31 amended § 961.41(3g) by creating sub. (3g)(em) which prohibited possession of "a controlled substance specified in s. 961.14(4)(tb) to (ty)." Those substances are nonnarcotic, hallucinogenic substances commonly known as "synthetic cannabinoids." 2013 Wisconsin Act 351 amended § 961.41(3g)(em) to refer to "a controlled substance specified in s. 961.14(4)(tb)." Act 351 also repealed and recreated sub. (4)(tb) to include the entire list of substances considered to be "synthetic cannabinoids" and repealed subsecs. (4)(te) through (4)(ty). [Effective date: April 25, 2014.]

The term "synthetic cannabinoid" does not appear in the text of sub. (3g)(em) but is used as the title of that subsection. The Committee recommends that, if the parties agree, the term be used in the instruction where it calls for "(name controlled substance)." The actual names of the "synthetic cannabinoids" as they appear in § 961.14(4)(tb) would have no meaning to the jury and are generally unpronounceable.

The state will be required to prove that the substance in question was in fact one of the chemicals designated a "synthetic cannabinoid" under § 961.14(4)(tb).

All the possession offenses listed above prohibit both "possession" and "attempts to possess." Regarding attempts, see Wis JI-Criminal 6031.

2013 Wisconsin Act 194 [effective date: April 9, 2014] created 961.443 which provides for "immunity from prosecution under s. 961.573, for the possession of drug paraphernalia, and under s. 961.41(3g), for the possession of a controlled substance . . ." for a person who qualifies as an "aider." "Aider" is defined in 961.443(1); it is apparently intended to identify those who try to get help for another person who is having an adverse reaction to the use of a controlled substance.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 493, 508-09, 451 N.W.2d 752 (1990).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of

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drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Ibid.

3. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another:

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

5. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

In a case involving delivery, it is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

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6031 ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE — § 961.41(3g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess or attempt to possess (name controlled substance).[1] (Name controlled substance) is a controlled substance whose possession is prohibited by law.][2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant attempted to possess a substance.

   Attempt requires that the defendant intended to possess (name controlled substance) and did acts which indicated unequivocally that the defendant intended to possess (name controlled substance) and would have done so except for the intervention of another person or some other extraneous factor.[3]

   "Possessed" means that the defendant knowingly[4] had actual physical control[5] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][6]

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2. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][7]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6031 was originally published in 1995 and revised in 1996, 2010, and 2014. This revision was approved by the Committee in June 2014; it revised the Comment.

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Section 961.41(3g) prohibits both "possession of" and "attempts to possess" controlled substances and the analogs of those substances. This instruction is drafted for a case involving a charge of attempted possession. It differs from the instruction for possession cases (see Wis JI-Criminal 6030) in that it has two elements instead of three. The second element of the possession offense – "that the substance was (name controlled substance)" – has been eliminated here. It is sufficient to constitute an attempt that the defendant intended to possess a controlled substance; it is not required that the substance in fact be a controlled substance. (See State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1995), holding that it constitutes an attempt to receive stolen property where the defendant intended to receive property that in fact was not "stolen," but which he believed to be stolen.)

1. The penalty for possession offenses varies with the type of substance possessed. The penalties are set forth in the following subsections of § 961.41(3g):

(3g)(am) —	a controlled substance classified in Schedule I or II which is a narcotic drug
(3g)(b) —	a controlled substance other than one classified in Schedule I or II which is a narcotic drug [except as provided in subs. (3g)(c) to (g))]
(3g)(c) —	cocaine or cocaine base
(3g)(d) —	lysergic acid diethylamide, phencyclidine, amphetamine, methcathinone, methylenedioxypyrovalerone, 4-methylmethcathinone, psilocin or psilocybin
(3g)(e) —	tetrahydrocannabinols
(3g)(em) —	synthetic cannabinoids
(3g)(f) —	gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine or flunitrazepam
(3g)(g) —	methamphetamine

Note: All the penalty subsections except sub. (3g)(am) refer to "possesses or attempts to possess – see the discussion preceding footnote 1.

2. The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance throughout the instruction. Whether the defendant actually intended to possess the substance remains a question for the jury.

3. The definition of attempt provided here is adapted from the full definition in § 939.32. The definition in § 939.32 "applies to crimes throughout the statutes and is not limited to the Criminal Code." § 939.20. The briefer definition is believed to be sufficient for most cases. If more is desired, see Wis JI-Criminal 580, Attempt. Wis JI-Criminal 580 includes an extensive Comment, including a discussion of State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988), which held that proof of the existence of an "extraneous factor" is not required to establish a criminal attempt.

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 2, supra.

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

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[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

7. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

It is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

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6035 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER [§ 961.41(1m)] WITH LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance with intent to deliver.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of Possession With Intent To Deliver That the State Must Prove

1. The defendant possessed a substance.

   "Possessed" means that the defendant knowingly[1] had actual physical control[2] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

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IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

4. The defendant intended to deliver (name controlled substance).

"Deliver" means to transfer or attempt to transfer from one person to another.[5]

"Intended to deliver" means that the defendant had the purpose to deliver or was aware that (his) (her) conduct was practically certain to cause delivery.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of possession of a controlled substance with intent to deliver have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must not find the defendant guilty of possession with intent to deliver,[8] [CONTINUE WITH THE FOLLOWING IF THE LESSER INCLUDED OFFENSE IS SUBMITTED] and you should consider whether the defendant is guilty of possession of (name controlled substance) in violation of section 961.41_____[9] of the Wisconsin Statutes.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of possession with intent to deliver before considering the offense of possession. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of possession with intent to deliver, you should consider whether the defendant is guilty of possession of (name controlled substance).

Elements of Possession Of A Controlled Substance That the State Must Prove

1. The defendant possessed a substance.
2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.
3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][10]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty of possession of a controlled substance.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant possessed a controlled substance with intent to deliver, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt from the evidence in this case that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6035 was originally published in 1976 and revised in 1987, 1990, 1996, and 2010. This revision was approved by the Committee in April 2018; it added a cross reference to Wis JI-Criminal 6001 to the Comment.

The penalty for offenses involving possession with intent to deliver a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

A person who holds drugs for another and intends to return the drugs to that person has the "intent to deliver" required for a violation of § 961.41(1m). State v. Pinkard, 2005 WI App 226, 287 Wis.2d 592, 706 N.W.2d 157. "Whether Pinkard had delivered the drugs to the original owner for distribution to buyers, or to a third party for distribution to buyers, the ultimate conduct would have been the same: delivering drugs for use by others, a crime the legislature intended to punish under Wis. Stat. § 961.41(1m)." Ibid, ¶12.

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1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

It is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

5. See section 961.01(6).

6. See section 939.23(4) and Wis JI-Criminal 923B.

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7. Subsection 961.41(1m) provides as follows with respect to intent to manufacture or deliver:

Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

8. Wis JI-Criminal 6035 includes an instruction for a finding on the lesser included offense of simple possession. Of course, it is to be used only if a reasonable interpretation of the evidence supports the instruction. See SM-6, Instructing the Jury on Lesser Included Offenses, for a discussion of the evidentiary standard. The transitional material leading into the finding on the lesser included offense is adapted from Wis JI-Criminal 112A.

9. In the blank, insert the appropriate statutory subsection. It will vary depending on the nature of the substance possessed. See note 1, Wis JI-Criminal 6030.

10. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

It is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

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6036 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE [§ 961.41(1m)] WITH LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance with intent to manufacture.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of Possession With Intent To Manufacture That the State Must Prove

1. The defendant possessed a substance.

   "Possessed" means that the defendant knowingly[1] had actual physical control[2] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

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IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

4. The defendant intended to manufacture (name controlled substance).

"Intended to manufacture" means that the defendant had the purpose to manufacture.

"Manufacture" [means to (produce) (propagate) (compound) (convert) (process) a controlled substance] [directly or indirectly (by extraction from substances of natural origin) or (by chemical synthesis)] [includes packaging or repackaging of the substance or labeling or relabeling of its container].[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.[6]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of possession of a controlled substance with intent to manufacture have been proved, you should find the defendant guilty.

If you are not so satisfied, you must not find the defendant guilty of possession with intent to manufacture,[7] [CONTINUE WITH THE FOLLOWING IF THE LESSER INCLUDED OFFENSE IS SUBMITTED] and you should consider whether the defendant is guilty of possession of (name controlled substance) in violation of section 961.41_____[8] of the Wisconsin Statutes.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of possession with intent to manufacture before considering the offense of possession. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of possession with intent to manufacture, you should consider whether the defendant is guilty of possession of (name controlled substance).

Elements of Possession Of A Controlled Substance That the State Must Prove

1. The defendant possessed a substance.
2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

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3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty of possession of a controlled substance.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant possessed a controlled substance with intent to manufacture, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt from the evidence in this case that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6036 was originally published in 1976 and revised in 1987, 1990, 1994, 1996, and 2010. This revision was approved by the Committee in April 2018; it added a cross reference to Wis JI-Criminal 6001 to the Comment.

The penalty for offenses involving possession with intent to manufacture a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

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1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

In a case involving delivery, it is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

5. The definition of "manufacture" is based on the one provided in § 961.01(13). See note 3, Wis JI-Criminal 6021.

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6. Subsection 961.41(1m) provides as follows with respect to intent to manufacture or deliver:

Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

7. Wis JI-Criminal 6035 includes an instruction for a finding on the lesser included offense of simple possession. Of course, it is to be used only if a reasonable interpretation of the evidence supports the instruction. See SM-6, Instructing the Jury on Lesser Included Offenses, for a discussion of the evidentiary standard. The transitional material leading into the finding on the lesser included offense is adapted from Wis JI-Criminal 112A.

8. In the blank, insert the appropriate statutory subsection. It will vary depending on the nature of the substance possessed. See note 1, Wis JI-Criminal 6030.

9. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

It is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

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6037A KEEPING OR MAINTAINING A PLACE RESORTED TO BY PERSONS USING CONTROLLED SUBSTANCES IN VIOLATION OF CHAPTER 961 FOR THE PURPOSE OF USING CONTROLLED SUBSTANCES — § 961.42[1]

Statutory Definition of the Crime

Section 961.42 of the Wisconsin Statutes provides that it is unlawful for any person knowingly to keep or maintain any structure or place[2] which is resorted to by persons using controlled substances in violation of Chapter 961 for the purpose of using controlled substances.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant kept or maintained a structure or place.[3]

   To keep or maintain a place is to exercise management or control over the place.

   This element does not require that the defendant owned (name of place), but it does require that the defendant exercised management or control of the place in question.[4]

2. The place was resorted to by persons using controlled substances in violation of Chapter 961 for the purpose of using controlled substances.

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(Name substance) is a controlled substance, the use of which violates Chapter 961.[5]

3. The defendant kept or maintained the place knowingly.

"Knowingly" requires that the defendant knew that the place was resorted to by persons using controlled substances for the purpose of using controlled substances.[6]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6037A was originally published in 1993 and revised in 1996. This revision was approved by the Committee in August 2007 and involved adoption of a new format and nonsubstantive changes to the text.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

1. Section 961.42 applies to keeping or maintaining a structure or place for two different illicit purposes: for use by persons using controlled substances in violation of Chapter 961; and for manufacturing, keeping, or delivering controlled substances in violation of Chapter 961. The latter alternative is addressed by Wis JI-Criminal 6037B.

The penalty is a fine of not more than $25,000 or imprisonment for not more than one year, or both.

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2. The instruction refers to "structure or place," but § 961.42 provides a more extensive list: ". . . any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place." The rest of the instruction uses the general term, "place." If one of the more specific terms is identified by the charge or the evidence, it should be used in the instruction as well.

For a case involving a vehicle, see State v. Slagle, 2007 WI App 117, 300 Wis.2d 662, 731 N.W.2d 284, where the court found the evidence insufficient to establish that the use of a vehicle on a single occasion was for "keeping" cocaine. See Wis JI-Criminal 6037B.

3. See note 2, supra.

4. "Keep" is not defined in statutes or case law. The Committee concluded that it implies the exercise of management or control over the operation of the place. See Wis JI-Criminal 1570, Keeping a Place of Prostitution.

5. Section 961.42 refers to "using controlled substances in violation of Chapter 961." Literally speaking, Chapter 961 does not prohibit the "use" of controlled substances. Rather, it prohibits possession, delivery, manufacture, etc. As a practical matter, of course, any "use" of a controlled substance would inevitably involve at least possession and thus would be "in violation of Chapter 961."

6. Section 961.42(1) specifically requires that the violation be committed "knowingly." This requires knowledge that the place was used in connection with controlled substances. For a discussion of various issues relating to the knowledge requirement in controlled substance cases, see Wis JI-Criminal 6000.

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6037B KEEPING OR MAINTAINING A PLACE USED FOR MANUFACTURING, KEEPING, OR DELIVERING CONTROLLED SUBSTANCES — § 961.42[1]

Statutory Definition of the Crime

Section 961.42 of the Wisconsin Statutes provides that it is unlawful for any person knowingly to keep or maintain any structure or place[2] which is used for manufacturing, keeping, or delivering controlled substances.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant kept or maintained a structure or place.[4]

   To keep or maintain a place is to exercise management or control over the place.

   This element does not require that the defendant owned (name of place), but it does require that the defendant exercised management or control of the place in question.[5]

2. The place was used for (manufacturing) (keeping) (delivering) (name controlled substance).[6] (Name controlled substance) is a controlled substance whose (manufacture) (keeping) (delivery) is prohibited by law.

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["Manufacturing" means the production, preparation, propagation, or processing of a controlled substance.][7]

["Keeping" requires that controlled substances be kept for the purpose of warehousing or storage for ultimate manufacture or delivery. It requires more than simple possession.][8]

["Delivering" means the transfer or attempt to transfer something from one person to another.][9]

3. The defendant kept or maintained the place knowingly.

"Knowingly" requires that the defendant knew that the place was used for the (manufacture) (keeping) (delivery) of (name controlled substance).[10]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 6037B was originally published as Wis JI-Criminal 6037 in 1989. It was renumbered Wis JI-Criminal 6037B and revised in nonsubstantive ways in March 1993. It was revised in 1994 to change the definition of "manufacture." See footnote 7, below. It was revised in 1996 to add to the text at footnote 5 and in 2008 to adopt a new format. This revision was approved by the Committee in February 2010 and involved nonsubstantive changes to the text.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

1. Section 961.42 applies to keeping or maintaining a structure or place for two different illicit purposes: for use by persons using controlled substances in violation of Chapter 961; and for manufacturing, keeping, or delivering controlled substances in violation of Chapter 961. The latter alternative is addressed by this instruction. The former is addressed by Wis JI-Criminal 6037A.

2. The instruction refers to "structure or place," but § 961.42 provides a more extensive list: ". . . any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place." The rest of the instruction uses the general term, "place." If one of the more specific terms is identified by the charge or the evidence, it should be used in the instruction as well.

For a case involving a vehicle, see State v. Slagle, 2007 WI App 117, 300 Wis.2d 662, 731 N.W.2d 284, where the court found the evidence insufficient to establish that the use of a vehicle on a single occasion was for "keeping" cocaine. See note 8, below.

3. Section 961.42(1) defines this offense in terms of maintaining a place "which is used for manufacturing, keeping, or delivering [controlled substances] in violation of this chapter," (emphasis added). Generally, the underlined phrase would require adding to the instruction that the manufacture, keeping, or delivery be "in violation of Chapter 961." That addition was not made in this instruction, however, because the Committee concluded that the other elements of the offense, properly defined, will always establish that the manufacture, keeping, or delivery was in violation of Chapter 961.

The only exception would be where one of the exceptions to the penalties imposed by Chapter 961 applies, such as the possession and special use authorizations set forth in §§ 961.32 and 961.335, respectively. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925). These situations are best handled, in the Committee's judgment, in the same manner as an "affirmative defense." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

4. See note 2, supra.

5. "Keep" is not defined in statutes or case law. The Committee concluded that it implies the exercise of management or control over the operation of the place. See Wis JI-Criminal 1570, Keeping a Place of Prostitution.

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6. The instruction provides for inserting the name of the specific controlled substance, based on the Committee's conclusion that it adds clarity to do so. Whether the place was actually maintained for the manufacture, keeping, or delivery of the controlled substance is the factual issue for the jury to determine.

7. The definition of "manufacture" is based on the one provided in § 961.01(13), as revised by 1993 Wisconsin Act 129 (effective date: March 19, 1994). In addition to grammatical changes, the statutory revision made one substantive change: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated. The exceptions for practitioners remain. See note 3, Wis JI-Criminal 6021.

8. In State v. Brooks, 124 Wis.2d 349, 369 N.W.2d 183 (Ct. App. 1985), the court held that "keeping" had to be defined in a way that distinguished it from mere possession under § 961.41(3): "We read into the noun 'keeping' in sec. 961.42(1) the requirement that the controlled substance be kept for the purpose of warehousing or storage for ultimate manufacture or delivery." 124 Wis.2d 349, 354.

Brooks was applied to a case involving a vehicle in State v. Slagle, 2007 WI App 117, 300 Wis.2d 662, 731 N.W.2d 284. The court found the evidence insufficient to establish that the use of a vehicle on a single occasion was for "keeping" cocaine.

9. This definition was adapted from the one provided in § 961.01(6). See note 3, Wis JI-Criminal 6020.

10. Section 961.42(1) specifically requires that the violation be committed "knowingly." This requires knowledge that the place was used in connection with controlled substances. For a discussion of various issues relating to the knowledge requirement in controlled substance cases, see Wis JI-Criminal 6000.

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6038 ACQUIRING POSSESSION OF A CONTROLLED SUBSTANCE BY MISREPRESENTATION — § 961.43(1)(a)

Statutory Definition of the Crime

The Wisconsin Statutes[1] make it a crime to acquire possession of (name controlled substance) [2] by misrepresentation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained possession of a substance.[3]

   "Possession" means that the defendant knowingly[4] had actual physical control of a substance.[5]

2. The substance was (name controlled substance) .[6] (Name controlled substance) is a controlled substance whose possession is regulated by law.

3. The defendant believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is regulated by law.][7]

4. The defendant obtained possession of the substance by misrepresentation made with the intent to deceive another and with intent to induce that person to rely and act thereon.[8]

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This element requires that the defendant intended to deceive (name person) and intended to induce (name person) to rely and act on the misrepresentation.

5. (Name person) was deceived by the misrepresentation.

This requires that (name person) must have been induced to and did in fact part with possession of the (name controlled substance) in reliance upon the misrepresentation.

Deciding About Belief and Intent

You cannot look into a person's mind to find belief or intent. While belief and intent must be found as a fact before you can find the defendant guilty, they must be found, if found at all, from any acts, words, or statements bearing upon belief and intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6038 was originally published in 1983 and revised in 1987, 1995, 1996, and 2007. This revision was approved by the Committee in February 2010 and involved nonsubstantive changes to the text.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

1. Section 961.43(1)(a) provides that it is unlawful for any person to "acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge."

2. The instruction has been drafted to provide for the insertion of the specific name of the substance as alleged in the information. The Committee has concluded that it adds clarity to use the name of the

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alleged substance throughout the instruction, although whether the defendant actually possessed the substance remains a question for the jury (see the second element).

3. Although it should rarely be in issue with respect to this offense, it is not required that a substantial amount of the substance be obtained — any amount is sufficient. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 6, supra.

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance from this point on in the instruction. Whether the substance actually is the substance named and whether the defendant actually delivered the substance remain questions for the jury. The identity of a controlled substance may be proved without an expert, by circumstantial evidence. State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993).

7. The defendant must believe that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978).

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

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In a case involving delivery, it is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

8. The explanation of the fourth element was adapted from the elements of theft by fraud set forth in § 943.20(1)(d).

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6040 DELIVERY OF AN IMITATION CONTROLLED SUBSTANCE: FELONY[1] — § 961.41(4)(am)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to deliver[2] a substance to another person and represent to that person that the substance is a controlled substance, knowing that it is not a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered[3] a substance[4] to (name recipient).

   "Deliver" means to transfer or attempt to transfer something from one person to another.[5]

2. The defendant represented to (name recipient) that the substance was (name controlled substance).

   (Name controlled substance) is a controlled substance.[6]

   This requires that the defendant indicated by words or conduct that the substance was (name controlled substance).[7]

3. The substance was not a controlled substance.

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It is not necessary for the State to establish what the substance was. It is sufficient if the substance was not a controlled substance.[8]

4. The defendant knew the substance was not a controlled substance.[9]

Deciding About Knowledge

You cannot look into a person's mind to determine knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6040 was originally published in 1983 and revised in 1992, 1996, and 2001. This revision was approved by the Committee in April 2006.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

This instruction is for a violation of subsec. (am)1.a. of § 961.41(4), which was created as § 161.41(4)(a) by Chapter 90, Laws of 1981, and reads as follows:

> (4) IMITATION CONTROLLED SUBSTANCES (am)1. No person may knowingly distribute or deliver, attempt to distribute or deliver or cause to be distributed or delivered a noncontrolled substance and expressly or impliedly represent any of the following to the recipient:
> a. That the substance is a controlled substance.
> b. That the substance is of a nature, appearance or effect that will allow the recipient to display, sell, distribute, deliver, or use the noncontrolled substance as a controlled substance, if the representation is made under circumstances in which the person has reasonable cause to believe that the noncontrolled substance will be used or distributed for use as a controlled substance.

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Subsection (4)(am)2. identifies several circumstances that are considered to be "prima facie" evidence of a representation that a substance is controlled.

Note that a penalty is provided in subsec. (4)(am)3.; the penalty structure set forth in § 961.41(1) does not apply to this offense.

A very similar offense with a misdemeanor penalty is defined in § 961.41(4)(bm). See Wis JI-Criminal 6042.

1. If the title is to be included in the written copy of the instructions provided to the jury, "FELONY" should be deleted.

2. The instruction is drafted for offenses involving "delivery." The statute also applies to "distribution," which is defined essentially as a "delivery." See § 961.01(9). Thus, instructing as to "delivery" ought to be sufficient in either situation.

The statute also applies to attempts to deliver or distribute and "causing" delivery or distribution. For "causing to deliver" cases, the instruction should be modified. The instruction ought to be sufficient as drafted for attempted delivery cases. "Deliver" is defined in § 961.01(6) as an "actual, constructive or attempted transfer from one person to another . . ." The instruction includes the substance of that definition in the first element. Also see note 4, below.

3. See note 2, supra.

4. The statute is phrased in terms of delivery "of a noncontrolled substance." "Noncontrolled substance" is not defined in the statutes and apparently has no special meaning. Therefore, the instruction is drafted in terms of "delivery of a substance," the conclusion of the Committee being that it is not necessary for the state to prove that the substance was "noncontrolled." However, it is necessary to establish that the substance was not what it was represented to be; see the third element.

5. This definition was adopted from that found in § 961.01(6) which reads as follows:

> "Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

6. Because all controlled substances are listed by name in the schedules in Chapter 961, the jury may be told that, for example, "cocaine is a controlled substance."

7. Subsection 961.41(4)(am)2. defines four types of conduct which are to be considered "prima facie evidence" of a representation that a substance is a controlled substance. The Committee concluded that the significance of these four matters should be that evidence tending to establish one of them is enough to justify sending the case to the jury. But the Committee also concluded that it was not appropriate to instruct the jury on the effect of the prima facie evidence.

8. See note 4, supra.

9. The knowledge element of the instruction is based on a plain language reading of the statute: "knowingly deliver a noncontrolled substance" means that the person must know that what he delivers is a

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noncontrolled substance. This is believed to be consistent with the rule for Criminal Code offenses, to which § 939.23(2) applies: "'Know' requires only that the actor believes that the specified fact exists." Here, the "specified fact" is that the substance is noncontrolled.

In 1992, the Committee reviewed this knowledge element in light of case law from other states. Most states have statutes similar to Wisconsin's, and there is extensive case law interpreting those statutes. A majority of the decisions conclude that knowledge of the noncontrolled nature of the substance is not required. See State v. Shiffbauer, 251 N.W.2d 359 (Neb. 1977); People v. Pfarr, 696 P.2d 235 (Colo. 1984); State v. Thomas, 428 So. 2d 327 (Fla. App. 1983); State v. Marsh, 684 P.2d 459 (Kan. App. 1984); State v. Lauterbach, 653 P.2d 1320 (Wash. App. 1982); State v. Freeman, 450 N.W.2d 826 (Iowa 1990); Jenkins v. State, 788 S.W.2d 677 (Tex. App. 1990); State v. Pierre, 500 So.2d 382 (La. 1987); and Annotation, Validity, Construction, and Effect of State Statutes Regulating Sales of Counterfeit or Imitation Controlled Substances, 84 A.L.R.4th 936 (1991).

For contrary conclusions, see State v. Duncan, 414 N.W.2d 91 (Iowa 1987), and State v. Mughni, 514 N.E.2d 870 (Ohio 1987).

For several reasons, the Committee did not find the authority from other states persuasive. First, the statutes are all slightly different. Some use "knowingly" and some do not. Those that use "knowingly" do not connect it with "noncontrolled" as Wisconsin's statute does. For example, the Kansas statute says: "no person shall knowingly deliver any substance which is not a controlled substance . . . under circumstances which would give a reasonable person reason to believe it is a controlled substance." Nebraska prohibits: "knowingly or intentionally delivering a substance that the person represents is a controlled substance but which in fact is not such a substance." Both the Kansas and Nebraska courts held that it is not necessary to prove that the defendant knew the substance was not controlled. But neither statute connects "knowingly" with "noncontrolled substances."

Further, the legislative history of the Wisconsin provision is relevant. In an early draft of the bill, the main subsection of the statute, which was (4)(a) at that time, did not have "knowingly" in it. It simply read: "It is unlawful for any person to deliver, attempt to deliver, or cause to be delivered a noncontrolled substance. . . ." "Knowingly" was written in after "person" in the above sentence and was included in the statute as enacted.

That same draft had a subsection (c) that was first revised, then deleted entirely, and not included in the statute as enacted. That subsection provided:

> In any prosecution for unlawful delivery of a noncontrolled substance it is no defense that the accused believed the noncontrolled substance to actually be a controlled substance.

It appears likely that the original draft of the statute, which did not include "knowingly" and did not include sub. (c), was patterned after a model or uniform act because it closely resembles some of the statutes involved in the cases cited above. It does not match exactly with the current versions of the various model acts. The biggest difference is the way "knowingly" is used.

Finally, Wisconsin has another statute that seems to apply to the same sort of conduct and which does not include "knowingly." See § 961.41(4)(bm), punished by a fine of up to $500 and imprisonment for up to six months or both. See Wis JI-Criminal 6042.

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Given this background and the absence of any case law interpreting the Wisconsin statute [but see State v. Cooper, 127 Wis.2d 429, 380 N.W.2d 383 (Ct. App. 1985), dissent referring to what was then § 161.41(4)(a) but decided on other grounds], the Committee concluded that the plain language of the statute should prevail.

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6042 DELIVERY OF AN IMITATION CONTROLLED SUBSTANCE: MISDEMEANOR[1] — § 961.41(4)(bm)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to offer to have any controlled substance unlawfully delivered to another person and then to deliver a substance which is not a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant offered to have a controlled substance unlawfully delivered to (name recipient).

   "Deliver" means to transfer or attempt to transfer something from one person to another.[2]

   (Name controlled substance) is a controlled substance which is unlawful to deliver.[3]

   This element requires that the defendant indicated by words or conduct that the substance was (name controlled substance).[4]

2. The defendant [delivered] [arranged to have delivered][5] a substance to (name recipient) that was not a name controlled substance.

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It is not necessary for the State to establish what the substance was. It is sufficient if the substance was not a name controlled substance.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6042 was approved by the Committee in April 2006.

This instruction is for a violation of subsec. (4)(bm) of § 961.41. The statute originally appeared as § 161.41(2m) and was renumbered by 1995 Wisconsin Act 448. It reads as follows:

> (4) IMITATION CONTROLLED SUBSTANCES . . . . (bm) It is unlawful for any person to agree, consent or offer to lawfully manufacture, deliver , distribute, or dispense any controlled substance to any person, or to offer, arrange or negotiate to have any controlled substance unlawfully manufactured, delivered, distributed or dispensed, and then manufacture, deliver, distribute, or dispense or offer, arrange or negotiate to have manufactured, delivered, distributed or dispensed to any such person a substance which is not a controlled substance.

The penalty is a fine of not more than $500 or imprisonment for not more than 6 months or both. A very similar offense with a felony penalty is defined in § 961.41(4)(am). See Wis JI-Criminal 6040. That offense requires that the defendant "knowingly" deliver, etc., which is not required for this offense.

1. If the title is to be included in the written copy of the instructions provided to the jury, "MISDEMEANOR" should be deleted.

2. This definition was adopted from that found in § 961.01(6) which reads as follows:

> "Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

3. This is the approach typically used in the controlled substance instructions. The statutes specifically list the substances that are "controlled substances"; except for certain statutory exceptions, delivery of any controlled substance is unlawful.

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4. This statement is borrowed from Wis JI-Criminal 6040. In the context of this offense, to "offer" to deliver a controlled substance must require some representation that the substance is a "controlled substance."

5. Choose the alternative supported by the evidence. The Committee concluded that the statute applies where the defendant delivers the substance personally or arranges for another person to deliver the substance.

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6044 POSSESSION OF METHAMPHETAMINE WASTE — § 961.67(2)(a)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to knowingly possess methamphetamine manufacturing waste.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly possessed a substance.

"Possessed" means that the defendant knowingly[1] had actual physical control of a substance.[2]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[A substance is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance.]

[It is not required that a person own a substance in order to possess it. What is required is that the person exercise control over the substance.]

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

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[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was methamphetamine manufacturing waste.

3. The defendant knew that the substance was methamphetamine manufacturing waste.[4]

Meaning of "Methamphetamine Manufacturing Waste"

"Methamphetamine manufacturing waste" means any solid, semisolid, liquid or contained gaseous material or article that results from or is produced by the manufacture of methamphetamine.[5]

Deciding About Knowledge

You cannot look into a person's mind to determine knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6044 was originally published in 2002. It was revised in 2009 to reflect the renumbering of the statute.

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This instruction is for violations of § 961.67(2)(a): knowingly possessing methamphetamine manufacturing waste. The statute was created as § 961.437 by 1999 Wisconsin Act 129, effective date: May 24, 2000. It was renumbered § 961.67 by 2005 Wisconsin Act 14, effective date: June 22, 2005. Subsection (2)(b) prohibits intentionally disposing of methamphetamine manufacturing waste. A uniform instruction has not been drafted for that offense because the possession offense is likely to cover that conduct: one who disposes of material must have possessed it.

Subsection (3) creates an exception for persons who are handling the material in compliance with statutes dealing with solid and hazardous waste or who have notified law enforcement of the existence of the material.

1. Section 961.67(2)(a) specifically requires that the defendant "knowingly possess" methamphetamine manufacturing waste.

In addition, inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

2. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. This statement is included in instructions for possession of a controlled substance and the Committee concluded that it properly applies here, as well. Regarding possession of a controlled substance, see State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. This requirement is based on the statute's requirement that the defendant "knowingly possess" methamphetamine manufacturing waste.

5. See § 961.67(1)(c). The statutory definition includes reference to "a controlled substance analog of methamphetamine." The Committee concluded that prosecution for violation of this statute is unlikely to be based on manufacturing an "analog" and therefore did not include that reference in the instruction. And, the statutory definition concludes with: ". . . in violation of this chapter." The Committee also concluded that retaining that reference in the instruction was not necessary. If the facts of a case raise the issue of methamphetamine being manufactured in compliance with Chapter 961, the instruction must be modified.

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6046 USING A CHILD TO DELIVER A CONTROLLED SUBSTANCE[1] — § 961.455

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for any person who has attained the age of 17 years to knowingly use a child[2] to deliver a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) delivered[3] a substance.

   "Deliver" means to transfer or attempt to transfer something from one person to another.[4]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. (Name of child) was a child, that is, had not attained the age of 18 years at the time of the alleged delivery.

   Knowledge of (name of child)'s age by the defendant is not required and mistake regarding (name of child)'s age is not a defense.[5]

4. The defendant knowingly used[6] (name of child) to deliver (name controlled substance).

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This requires that the defendant knew that (name of child) delivered a substance to another person and knew that the substance was (name controlled substance).[7]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

5. The defendant had attained the age of 17 years at the time of the alleged delivery.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 6046 was originally published in 1990 and revised in 1996. This revision involved a nonsubstantive editorial correction and was approved by the Committee in February 2010.

This instruction is for a violation of § 961.455, created by 1989 Wisconsin Act 121 (effective date: January 31, 1990.)

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

1. The instruction uses "to deliver" in place of the words of the statute: "for the purpose of violating § 961.41(1)." Section 961.41(1) makes it unlawful for any person to manufacture, distribute, or deliver a controlled substance. The Committee concluded that offenses involving delivery are likely to be the most common and therefore drafted this instruction for delivery cases. For cases involving manufacture, Wis JI-Criminal 6021 may be helpful as a model.

Further, this instruction is drafted for the case where an actual delivery has taken place. But a delivery is apparently not required by the words of § 961.455 which refer to using a child "for the purpose of" violating § 161.41. The plain meaning of that phrase appears to be that it is sufficient if the defendant uses a child for the purpose of delivering a controlled substance, even if there is not an actual delivery. This conclusion is supported by subsection (4) of § 961.455 which provides: "If the conduct described under sub. (1) results in a violation under § 961.41(1), the actor is subject to prosecution and conviction under § 961.41(1) or this section or both." See Wis JI-Criminal 6047, which is drafted for a case where a delivery has not necessarily taken place.

2. The instruction uses "child" as the more understandable equivalent of the statute's reference to persons who "is 17 years of age or under." The third element defines "child" in the more common way — as one who "has not attained the age of 18 years."

3. See note 1, supra.

4. This definition was adapted from that found in § 961.01(6), which reads as follows:

> "Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

5. See § 961.455(2).

6. "Uses" is one of the five verbs used in § 961.455: ". . . solicits, hires, directs, employs, or uses . . ." One of the other terms should be substituted if appropriate in a particular case. Wis JI-Criminal 6047 is drafted for a "soliciting" case where a delivery has not necessarily taken place.

7. For controlled substances cases generally, the defendant must know that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). See the discussion at Wis JI-Criminal 6020, note 3, and Wis JI-Criminal 6000.

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6047 SOLICITING A CHILD FOR THE PURPOSE OF DELIVERING A CONTROLLED SUBSTANCE[1] — § 961.455

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for a person who has attained the age of 17 years to knowingly solicit a child[2] for the purpose of delivering a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly solicited (name of child) for the purpose of[3] delivering[4] a substance.

   "Deliver" means to transfer or attempt to transfer something from one person to another.[5]

   "Solicit" means to advise another person to commit a crime under circumstances that indicate, unequivocally, that the person intends that the crime be committed.[6]

   "Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's conduct, under the circumstances.[7]

   Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant advised (name of child) to deliver (name controlled substance) and intended that (name of child) deliver (name controlled

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substance). However, it is not required that any delivery actually took place. It is sufficient if the defendant solicited (name of child) for the purpose of delivering.[8]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. (Name of child) was a child, that is, had not attained the age of 18 years at the time of the alleged delivery.

Knowledge of (name of child)'s age by the defendant is not required and mistake regarding (name of child)'s age is not a defense.

4. The defendant had attained the age of 17 years at the time of the alleged delivery.

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 6047 was originally published in 1990 and revised in 1996. This revision involved a nonsubstantive editorial correction and was approved by the Committee in February 2010.

This instruction is for a violation of § 961.455, created by 1989 Wisconsin Act 121 (effective date: January 31, 1990.)

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

1. This instruction is for a violation of § 961.455 which involves soliciting a child for the purpose of delivering a controlled substance. There are several other variations of conduct that may violate this statute. Wis JI-Criminal 6046 is drafted for a case where a defendant uses a child to make an actual delivery. This instruction doe not require a delivery; the offense is committed if one solicits a child for the purpose of making a delivery. See the Comment to Wis JI-Criminal 6046 for a discussion of § 161.455.

2. The instruction uses "child" as the more understandable equivalent of the statute's reference to persons who "is 17 years of age or under." The third element defines "child" in the more common way — as one who "has not attained the age of 18 years."

3. This instruction is drafted for a case where the defendant is charged with soliciting a child for the purpose of delivering a controlled substance and a delivery has not necessarily taken place. That this conduct is prohibited by § 961.455(1) is apparently clear from the plain meaning of the statute, which includes the "for the purpose of" language. The conclusion is supported by subsection (4) of § 961.455 which provides: "If the conduct described under sub. (1) results in a violation under § 961.41(1), the actor is subject to prosecution and conviction under § 961.41(1) or this section or both."

4. See note 1, supra.

5. This definition was adapted from that found in § 961.01(6), which reads as follows:

> "Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

6. The definition of "solicit" is based on § 939.30, which defines the inchoate crime of solicitation as advising another to commit a felony under circumstances which indicate unequivocally that the person intends that such crime be committed. Subsection (3) of § 961.455 provides that "solicitation under sub. (1) occurs in the manner described under § 939.30. . . ." See Wis JI-Criminal 550, Solicitation As A Crime.

7. The definition of "unequivocally" is based on the one used in Wis JI-Criminal 580, Attempt.

8. See note 4, supra.

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6050 POSSESSION OF DRUG PARAPHERNALIA — § 961.573(1)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess drug paraphernalia with the primary intent to use the drug paraphernalia to ingest, inhale, or otherwise introduce into the human body[1] a controlled substance, in violation of Chapter 961 of the Wisconsin Statutes.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an item.

   "Possessed" means that the defendant knowingly[3] had actual physical control of an item.[4]

   ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

   [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

   [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

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[Possession may be shared with another person. If a person exercises control over an item, the item is in that person's possession, even though another person may also have similar control.]

2. The item in question was drug paraphernalia.

"Drug paraphernalia" means all equipment, products, and materials of any kind that are used, designed for use, or primarily intended for use to ingest, inhale, or otherwise introduce into the human body a controlled substance.[5]

(Name controlled substance) is a controlled substance.[6]

3. The defendant possessed drug paraphernalia with the primary intent[7] to use it to ingest, inhale, or otherwise introduce into the human body a controlled substance.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 6050 was originally published in 1993 and revised in 1994, 1996, and 2000. This revision was approved by the Committee in February 2006 and involved minor changes to the text and adding footnote 2.

This instruction is for the simple possession offense defined in § 961.573(1). It carries a penalty of a fine of not more than $500 or imprisonment for not more than 30 days or both. Section 961.573 was amended by 1999 Wisconsin Act 129 [effective date: May 24, 2000]. New sub. (3) was created; it prohibits possession of drug paraphernalia with "the primary intent" to use it in connection with methamphetamine. Violations of sub. (3) carry a maximum penalty of a fine of not more than $10,000 or imprisonment for not more than 5 years or both. See Wis JI-Criminal 6053.

Other drug paraphernalia offenses are defined in § 961.574, manufacture or delivery of drug paraphernalia; § 961.575, delivery of drug paraphernalia to a minor; and § 961.576, advertisement of drug paraphernalia.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses, including the offense addressed by this instruction, to include "controlled substance analogs." See Wis JI-Criminal 6005 for suggested changes for analog cases.

1. The phrase beginning with "to ingest" is selected from the following complete statement in § 961.573(1):

> . . . to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, inject, ingest, inhale, or otherwise introduce into the human body.

The Committee drafted the instruction for what is believed to be the most common case. If other alternatives are presented by the evidence, the instruction must be modified accordingly.

2. The reference to "in violation of Chapter 961" is included in the statutory definition of the crime, so it is included here. It is not included in the instruction's statement of the elements of the crime because the Committee concluded that "in violation of Chapter 961" could be addressed in the same way that statutory exceptions are generally treated. (See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon.) If the facts raise an issue about being "in violation of Chapter 961" a statement should be added to the second and third elements that indicates the burden is on the State to prove that there was intent to ingest, inhale, etc., "in violation of Chapter 961."

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of

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drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Ibid.

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

5. This definition is based on the extremely lengthy one provided in § 961.571(1)(a). The definition refers to "primarily intended for use." Subsec. 961.571(2) defines "primarily" as meaning "chiefly or mainly."

Subsection 961.571(1)(b) provides that "drug paraphernalia" excludes:

1. Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting substances into the human body.
2. Any items, including pipes, papers and accessories, that are designed for use or primarily intended for use with tobacco products.

[Note: "Parenteral" means "taken into the body or administered in a manner other than through the digestive tract, as by intravenous or intramuscular injection." American Heritage Dictionary of the English Language, 3rd Edition.]

Section 961.572 sets forth a list of twelve factors that "a court or other authority shall consider in addition to all other legally relevant factors" in determining whether an object is drug paraphernalia. It may be helpful to the jury to add something like the following to the instruction:

In determining whether an object is drug paraphernalia, you may consider any of the following:

[list the factors in § 961.572(1) (a) through (L) that apply].

6. The Committee believes it adds clarity to name the controlled substance for which the paraphernalia was used, designed, etc. Chapter 961 contains no general definition of "controlled substance." The term is defined only by reference to the various schedules. Thus, whether a substance is a "controlled substance" is a legal conclusion which the court may pass along to the jury. Whether the item of alleged paraphernalia was used in connection with a controlled substance is the factual issue that the jury must determine.

Note that offenses involving methamphetamine are separately defined in sub. (3) of § 961.573 and carry a higher penalty. See Comment preceding note 1, supra.

7. This mental element is specifically required by § 961.573.

The United States Supreme Court reviewed the mental element required by a federal statute relating to drug paraphernalia in Posters 'N' Things v. United States, 114 S.Ct. 1747 (May 23, 1994). The court focused

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on the definition of "drug paraphernalia" found in 21 U.S.C. § 857, which, like § 961.571(1)(a), refers to material "primarily intended" for use in ingesting, etc., drugs. The court held that the reference to "primarily intended" in the definition did not serve as the basis for a subjective mental requirement that would apply to the offense of selling drug paraphernalia. Rather, the Court held that all that is required for violations of § 857 is that the defendant "knew that the items at issue are likely to be used with illegal drugs."

The decision in Posters 'N' Things is not directly applicable to interpreting the Wisconsin statute addressed by this instruction. Here, the subjective mental element is stated in § 961.573, which defines the crime as possession of drug paraphernalia **with the primary intent** to ingest, etc., a controlled substance. This specifically requires a subjective mental element; one need not rely on the argument made by the Posters defendant that the reference to "primarily intended" in the definition of drug paraphernalia was the source of such an element.

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6053 POSSESSION OF DRUG PARAPHERNALIA: METHAMPHETAMINE — § 961.573(3)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess drug paraphernalia with the primary intent to use the drug paraphernalia to manufacture[1] methamphetamine in violation of Chapter 961 of the Wisconsin Statutes.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an item.

"Possessed" means that the defendant knowingly[3] had actual physical control of an item.[4]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

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[Possession may be shared with another person. If a person exercises control over an item, the item is in that person's possession, even though another person may also have similar control.]

2. The item in question was drug paraphernalia.

"Drug paraphernalia" means all equipment, products, and materials of any kind that are used, designed for use, or primarily intended for use to manufacture methamphetamine.[5]

3. The defendant possessed drug paraphernalia with the primary intent[6] to use it to manufacture methamphetamine.

"Intent to manufacture methamphetamine" means that the defendant had the purpose to manufacture methamphetamine.

"Manufacture methamphetamine"means to produce[7] methamphetamine.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS G FELONY AND THERE IS EVIDENCE THAT IT WAS COMMITTED IN THE PRESENCE OF A CHILD WHO WAS 14 YEARS OF AGE OR YOUNGER.[8]

If you find the defendant guilty, you must answer the following question:

1. "Had the defendant attained the age of 18 years at the time of the offense?"

If you answer question 1. "yes," you must answer question 2.

If you answer question 1. "no," do not answer question 2.

2. "Did the defendant commit this offense while in the presence of a child who was 14 years of age or younger?"

Before you may answer a question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6053 was originally published in 2006. This revision was approved by the Committee in August 2006; it reflects changes made by 2005 Wisconsin Act 263.

This instruction is for the offense defined in § 961.573(3), which prohibits possession of drug paraphernalia with "the primary intent" to use it in connection with methamphetamine. Subsection (3) was created by 1999 Wisconsin Act 129. [Effective date: May 24, 2000]. Basic violations are Class H felonies. The penalty increases to a Class G felony if the statute is violated in the presence of a child who is 14 years of age or younger. The latter was created by 2005 Wisconsin Act 263. [Effective date: April 20, 2006.] Violations of § 961.573(1), the general prohibition on drug paraphernalia, carry a maximum penalty of a fine of not more than $500 or imprisonment for not more than 30 days or both.

Other drug paraphernalia offenses are defined in § 961.574, manufacture or delivery of drug paraphernalia; § 961.575, delivery of drug paraphernalia to a minor; and § 961.576, advertisement of drug paraphernalia. There are no uniform instructions for those offenses. Section 961.65 defines the offense of possessing certain substances with intent to manufacture methamphetamine. See Wis JI-Criminal 6065.

1. The instruction is drafted for cases involving "manufacture" because the Committee concluded that "manufacture" is likely to be the most inclusive term. However, the statute applies to "manufacture,

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compound, convert, produce, process, prepare, test, analyze, pack, repack or store methamphetamine . . . ." If use of one of the other terms is necessary, the instruction should be modified by substituting that term for "manufacture" throughout and modifying the third element.

2. The reference to "in violation of Chapter 961" is included in the statutory definition of the crime, so it is included here. It is not included in the instruction's statement of the elements of the crime because the Committee concluded that "in violation of Chapter 961" could be addressed in the same way that statutory exceptions are generally treated. (See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon.) If the facts raise an issue about being "in violation of Chapter 961" a statement should be added to the second and third elements that indicates the burden is on the State to prove that there was intent to manufacture methamphetamine "in violation of Chapter 961."

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

5. This definition is based on the extremely lengthy one provided in § 961.571(1)(a). The definition refers to "primarily intended for use." Subsec. 961.571(2) defines "primarily" as meaning "chiefly or mainly."

Subsection 961.571(1)(b) provides that "drug paraphernalia" excludes:

1. Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting substances into the human body.
2. Any items, including pipes, papers and accessories, that are designed for use or primarily intended for use with tobacco products.

[Note: "Parenteral" means "taken into the body or administered in a manner other than through the digestive tract, as by intravenous or intramuscular injection." American Heritage Dictionary of the English Language, 3rd Edition.]

Section 961.572 sets forth a list of twelve factors that "a court or other authority shall consider in addition to all other legally relevant factors" in determining whether an object is drug paraphernalia. It may be helpful to the jury to add something like the following to the instruction:

In determining whether an object is drug paraphernalia, you may consider any of the following:

[list the factors in § 961.572(1) (a) through (L) that apply].

6. This mental element is specifically required by § 961.573(3).

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The United States Supreme Court reviewed the mental element required by a federal statute relating to drug paraphernalia in Posters 'N' Things v. United States, 114 S.Ct. 1747 (May 23, 1994). The court focused on the definition of "drug paraphernalia" found in 21 U.S.C. § 857, which, like § 961.571(1)(a), refers to material "primarily intended" for use in ingesting, etc., drugs. The court held that the reference to "primarily intended" in the definition did not serve as the basis for a subjective mental requirement that would apply to the offense of selling drug paraphernalia. Rather, the Court held that all that is required for violations of § 857 is that the defendant "knew that the items at issue are likely to be used with illegal drugs."

The decision in Posters 'N' Things is not directly applicable to interpreting the Wisconsin statute addressed by this instruction. Here, the subjective mental element is stated in § 961.573(3), which defines the crime as possession of drug paraphernalia **with the primary intent** to manufacture, etc., methamphetamine. This specifically requires a subjective mental element; one need not rely on the argument made by the Posters defendant that the reference to "primarily intended" in the definition of drug paraphernalia was the source of such an element.

7. Subsection 961.01(13) provides a lengthy definition of "manufacture" that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses "produce" because the Committee concluded that it is likely to apply in the greatest number of cases. If there is a dispute about whether a particular action constitutes "manufacturing," a detailed definition is provided by § 961.01(13):

> "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:
>
> (a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
> (b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated.

8. This material reflects the change made in the penalty provisions of s. 161.573 by 2005 Wisconsin Act 263. [Effective date: April 20, 2006.] The basic penalty is a Class H felony. However, sub. (3)(b)2. provides: "Any person who is 18 years of age or older and who violates par. (a) while in the presence of a child who is 14 years of age or younger is guilty of a Class G felony."

The Committee concluded that this provision identifies two factual matters that must be submitted to the jury: that the defendant is "18 years of age or older"; and, that the offense was committed in the presence of "a child who is 14 years of age or younger."

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As with similar penalty-increasing facts, the Committee believes these issues are best handled by submitting them to the jury as two special questions. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of possession of drug paraphernalia, under sec. 161.573(3), at the time an place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no."

1. "Had the defendant attained the age of 18 years at the time of the offense?"

If you answer question 1. "yes," you must answer question 2 "yes" or "no."

If you answer question 1. "no," do not answer question 2.

2. "Did the defendant commit this offense while in the presence of a child who was 14 years of age or younger?"

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6065 POSSESSING MATERIALS FOR MANUFACTURING METHAMPHETAMINE — § 961.65

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess (insert name of substance) [1] with intent to manufacture methamphetamine.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a substance, (insert name of substance) .[2]

"Possessed" means that the defendant knowingly[3] had actual physical control of that substance.[4]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[A substance is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance.]

[It is not required that a person own a substance in order to possess it. What is required is that the person exercise control over the substance.]

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][5]

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2. The defendant possessed (insert name of substance) with intent to manufacture methamphetamine.

"Intent to manufacture methamphetamine" means that the defendant had the purpose to manufacture methamphetamine.

"Manufacture methamphetamine" means to produce[6] methamphetamine.

With respect to intent to manufacture methamphetamine, you cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon intent. As part of the circumstances, you may consider the quantity and monetary value of the substance possessed.

[ADD THE FOLLOWING IF THERE IS EVIDENCE OF POSSESSION OF MORE THAN 9 GRAMS OF EPHEDRINE OR PSEUDOEPHEDRINE.][7]

[Evidence has been received that the defendant possessed more than 9 grams of (ephedrine) (pseudoephedrine).

If you are satisfied beyond a reasonable doubt that the defendant possessed more than 9 grams of (ephedrine) (pseudoephedrine), you may find from this fact alone that the defendant intended to manufacture methamphetamine, but you are not required to do so. You are the sole judges of the facts, and you must not find that the defendant intended to manufacture methamphetamine unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6065 was approved by the Committee in October 2005.

Wis JI-Criminal 6065 is drafted for a violation of § 961.65, an offense created by 2005 Wisconsin Act 14. The effective date is June 22, 2005.

1. Insert the name of the substance involved in the case. Those covered by § 961.65 are: "an ephedrine or pseudoephedrine product, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or pressurized ammonia. . . . '[E]phedrine' and 'pseudoephedrine' include any of their salts, isomers, and salts of isomers."§ 961.65.

2. Insert the name of the substance involved in the case. Those covered by § 961.65 are: "an ephedrine or pseudoephedrine product, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or pressurized ammonia. . . . '[E]phedrine' and 'pseudoephedrine' include any of their salts, isomers, and salts of isomers." See § 961.65.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Ibid.

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

5. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

6. Subsection 961.01(13) provides a lengthy definition of "manufacture" that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses "produce" because the Committee concluded that it is likely to apply in the greatest number of cases. The complete definition in § 961.01(13) is as follows:

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"Manufacture" means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:

(a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
(b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated.

7. The bracketed material implements the "rebuttable presumption of intent to manufacture," which is set forth in § 961.65 and stated as follows:

Possession of more than 9 grams of ephedrine or pseudoephedrine, other than pseudoephedrine contained in a product to which s. 961.01(20c)(a) or (b) applies, creates a rebuttable presumption of intent to manufacture methamphetamine.

The approach used in the instruction is the one the Committee has adopted to deal with "rebuttable presumptions" and "prima facie cases" in other situations. See Wis JI-Criminal 225.

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6070 USE OR POSSESSION OF A MASKING AGENT — § 961.69(2)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for a person to use, or possess with the primary intent to use, a masking agent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [used] [possessed with the primary intent to use] a substance or device.

   ["Possessed" means that the defendant knowingly had a substance or device under his actual physical control.][1]

2. The substance or device was a masking agent.

   A masking agent is any substance or device that is intended for use to defraud, circumvent, interfere with, or provide a substitute for a bodily fluid in conjunction with a lawfully administered drug test.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6070 was approved by the Committee in December 2016.

This instruction is for possession or use of a masking agent in violation of § 961.69(2), which was created by 2015 Wisconsin Act 264, effective date: March 19, 2016. Subsection (3) of § 961.69 prohibits delivery, possession with intent deliver, or manufacturing with intent to deliver, a masking agent. Subsection (4) prohibits placing an advertisement to promote the sale of a masking agent. Uniform instructions have not been drafted for violations of subs. (3) and (4).

1. "Possess" is defined in Wis JI-Criminal 920 to require "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

2. This is the definition of "masking agent" provided in § 961.69(1).

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6100 OBTAINING A PRESCRIPTION DRUG BY FRAUD — § 450.11(7)

Statutory Definition of the Crime

Section 450.11(7) of the Wisconsin Statutes is violated by one who obtains a prescription drug by willful misrepresentation.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained a prescription drug.

   A prescription drug is a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug.[2]

2. The defendant knew or believed that the substance was a prescription drug.[3]

3. The defendant obtained the prescription drug by a willful misrepresentation.

   This requires that the defendant intended to deceive (name person) and intended to induce (name person) to rely and act on the misrepresentation.

   This element also requires that (name person) was deceived by the misrepresentation. (Name person) must have been induced to and must have in fact parted with possession of the prescription drug in reliance upon the misrepresentation.

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6100 was originally published in 1996. This revision was approved by the Committee in June 2004 and involved adoption of a new format and revisions in the Comment.

This instruction is for one type of violation defined in § 450.11(7)(a), which reads as follows:

> No person may obtain or attempt to obtain a prescription drug, or procure or attempt to procure the administration of a prescription drug, by fraud, deceit or willful misrepresentation or by forgery or alteration of a prescription order; or by willful concealment of a material fact; or by use of a false name or address.

A similar violation relating to controlled substances is defined in § 961.43(1)(a). See Wis JI-Criminal 6038.

Violations of § 450.11(7) are punishable by a fine of not more than $500 or imprisonment for not more than 6 months, or both. § 450.11(9)(a). Violations resulting in delivery, or possession with intent to manufacture or deliver, are punishable as a Class H felony. For an instruction on offenses involving possession with intent to deliver, adding the fourth element of Wis JI-Criminal 6035 to this instruction should provide a usable model.

1. This statement of the offense selects from the various alternatives presented by the statute. See the Comment preceding this footnote. The statute prohibits obtaining or attempting to obtain a prescription drug and procuring or attempting to procure the administration of a prescription drug by fraud, deceit, willful misrepresentation, forgery, alteration of a prescription order, concealment of a material fact, or use of a false name or address.

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2. Section 450.01(20)(a) provides that "prescription drug" means "any drug, drug product or drug-containing preparation which is subject to 21 USC 353(b) or 21 CFR 201.105." Sub. (20)(b) of the same statute provides that for purposes of other subsections of § 450.11 certain controlled substances may be considered prescription drugs, but sub. (7) is not one of those subsections.

21 USC 353(b) reads as follows:

(1) A drug intended for use by man which —
(A) is a habit-forming drug to which 21 USC § 351(d) applies; or
(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
(C) is limited by an approved application under 21 USC § 355 to use under the professional supervision of a practitioner licensed by law to administer such drug, shall be dispensed only (I) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such a written or oral prescription if such refilling is authorized by the prescriber . . .

21 CFR 201.105 Veterinary Drugs, reads as follows:

A drug subject to the requirement of section 504(f)(l) of the act shall be exempt from section 502(f) of the act if all the following conditions are met:
(a) The drug is:
(1)(I) In the possession of a person (or his agents or employees) regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale distribution of drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or . . .

In the Committee's judgment, these definitions boil down to the one suggested in the instruction: "a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug."

3. This element is based on Wis JI-Criminal 6038, Acquiring Possession Of A Controlled Substance By Misrepresentation. A knowledge element like this is added to all the controlled substance instructions because of case law. See, for example, State v. Sartin, 200 Wis.2d 47, 547 N.W.2d 449 (1996).

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6110 POSSESSION OF A PRESCRIPTION DRUG WITH INTENT TO DELIVER — § 450.11(7)(g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a prescription drug with intent to deliver.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a substance.

   "Possessed" means that the defendant knowingly[1] had actual physical control[2] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was a prescription drug.

3. The defendant knew or believed that the substance was a prescription drug.[4]

   A prescription drug is a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug.[5]

4. The defendant intended to deliver a prescription drug.

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"Deliver" means to transfer or attempt to transfer from one person to another.[6] "Intended to deliver" means that the defendant had the purpose to deliver.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon intent and knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6110 was approved by the Committee in April 2006.

This instruction is drafted for violations of § 450.11(7)(g) and (9)(b). Subsection (9)(c) provides as follows:

> In any action or proceeding brought for the enforcement of this section, it shall not be necessary to negate any exception or exemption contained in this section, and the burden of proof of any such exception or exemption shall be upon the defendant.

The instruction does not address any "exceptions or exemptions."

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

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2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called "constructive possession."

3. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. This knowledge element is included to be consistent with the other instruction for a "prescription drug" offense — see Wis JI-Criminal 6100, footnote 3.

5. Section 450.01(20)(a) provides that "prescription drug" means "any drug, drug product or drug-containing preparation which is subject to 21 USC 353(b) or 21 CFR 201.105." Sub. (20)(b) of the same statute provides that for purposes of other subsections of § 450.11 certain controlled substances may be considered prescription drugs, but sub. (7) is not one of those subsections.

21 USC 353(b) reads as follows:

(1) A drug intended for use by man which —
(A) is a habit-forming drug to which 21 USC § 351(d) applies; or
(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
(C) is limited by an approved application under 21 USC § 355 to use under the professional supervision of a practitioner licensed by law to administer such drug, shall be dispensed only (I) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such a written or oral prescription if such refilling is authorized by the prescriber . . .

21 CFR 201.105 Veterinary Drugs, reads as follows:

A drug subject to the requirement of section 504(f)(l) of the act shall be exempt from section 502(f) of the act if all the following conditions are met:
(a) The drug is:
(1)(I) In the possession of a person (or his agents or employees) regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale distribution of drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or . . .

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In the Committee's judgment, these definitions boil down to the one suggested in the instruction: "a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug."

6. This is based on the definition of "delivery" in sec. 961.01(6).

7. "Intent" is defined in the Criminal Code to require either "mental purpose" or being "aware that (his) (her) conduct was practically certain to cause" the result. The Committee concluded that the "mental purpose" alternative is most likely to apply to this offense. But see, Wis JI-Criminal 923A and 923B.

8. This is based on section 450.11(7)(g), which applies to controlled substance violations and provides as follows with respect to intent to manufacture or deliver:

> . . . Intent under this paragraph may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the prescription drug prior to, during and after the alleged violation.

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6112 POSSESSION OF A PRESCRIPTION DRUG WITHOUT A VALID PRESCRIPTION — § 450.11(7)(h)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for a person to possess a prescription drug unless (he) (she) obtained it with a valid prescription.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a prescription drug.

   "Possessed" means that the defendant knowingly[2] had actual physical control[3] of a prescription drug.

   [It is not necessary that the quantity be substantial. Any amount is sufficient.][4]

   A prescription drug is a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug.[5]

2. The defendant knew or believed that the substance was a prescription drug.[6]

3. The prescription drug was not dispensed[7] to the defendant upon a prescription order issued by a practitioner.

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Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6112 was approved by the Committee in July 2009. A non-substantive editorial correction was made in 2013.

This instruction is drafted for violations of § 450.11(7)(h), which reads as follows: "No person may possess a prescription drug unless the prescription drug is obtained in compliance with this section." Section 450.11(1) provides that "[n]o person may dispense any prescribed drug or device except upon the prescription order of a practitioner." Reading these two sections together yields the offense addressed by this instruction: possessing a prescription drug without a valid prescription. The penalty for violations of § 450.11(7)(h) is set forth in sub. (9)(b).

Subsection (9)(c) of § 450.11 provides as follows:

> In any action or proceeding brought for the enforcement of this section, it shall not be necessary to negate any exception or exemption contained in this section, and the burden of proof of any such exception or exemption shall be upon the defendant.

The instruction does not address any "exceptions or exemptions."

1. This is a paraphrase of the definition of the offense in §450.11(7)(h), which reads as follows: "No person may possess a prescription drug unless the prescription drug is obtained in compliance with this section." Section 450.11(1) provides that "[n]o person may dispense any prescribed drug or device except upon the prescription order of a practitioner." Reading these two sections together yields the offense addressed by this instruction: possessing a prescription drug obtained without a valid prescription.

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2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

5. Section 450.01(20)(a) provides that "prescription drug" means "a drug, drug product, or drug-containing preparation that is subject to 21 USC 353(b) or 21 CFR 201.105." Subsection (20)(b) of § 450.01 provides that for purposes of specified subsections of § 450.11 certain controlled substances may be considered prescription drugs, but sub. (7) is not one of those subsections.

21 USC 353(b) reads as follows:

(1) A drug intended for use by man which —
(A) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
(B) is limited by an approved application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug; shall be dispensed only
(i) upon a written prescription of a practitioner licensed by law to administer such drug, or
(ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or
(iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

21 Sec. 201.105 Veterinary drugs, reads as follows:

A drug subject to the requirements of section 503(f)(1) of the act shall be exempt from section 502(f)(1) of the act if all the following conditions are met: (a) The drug is:
(1)(i) In the possession of a person (or his agents or employees) regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale distribution of drugs that are to

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be used only by or on the prescription or other order of a licensed veterinarian; or (ii) In the possession of a retail, hospital, or clinic pharmacy, or other person authorized under State law to dispense veterinary prescription drugs, who is regularly and lawfully engaged in dispensing drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or (iii) In the possession of a licensed veterinarian for use in the course of his professional practice . . .

In the Committee's judgment, these definitions boil down to the one suggested in the instruction: "a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug."

6. This knowledge element is included by analogy to controlled substance offenses, where case law has added a knowledge requirement. See, State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973), and State v. Sartin, 200 Wis.2d 47, 546 N.W.2d 449 (1996), discussed in Wis JI-Criminal 6000, Note On The Knowledge Element In Controlled Substance Cases.

7. "Dispense" is defined in § 450.01(7).

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SM-5 SUGGESTED ORDER OF INSTRUCTIONS

[RENUMBERED WIS JI-CRIMINAL 1.]

COMMENT

SM-5 was originally published in 1966. It was renumbered Wis JI-Criminal 1 in 1995.

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SM-6 JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES

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Scope

This Special Material attempts to provide a framework for deciding when it is proper to instruct the jury on a lesser included offense. There are two tests to consider: first, whether an offense is a lesser included offense of the crime charged; and second, whether the evidence supports an instruction on the lesser included offense. If both tests are satisfied, an instruction must be given upon request of either party.

I. When is a crime a lesser included offense of the charged crime?

The authority for convicting a defendant of a lesser included offense and the standard for determining when an offense is "lesser included" are found in § 939.66 of the Wisconsin Statutes:

> Conviction of included crime permitted. Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime but not both. An included crime may be any of the following:
>
> (1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.
>
> (2) A crime which is a less serious type of criminal homicide than the one charged.
>
> (2m) A crime which is a less serious or equally serious type of battery than the one charged.
>
> (2p) A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged.
>
> (2r) A crime which is a less serious type of violation under s. 943.23 than the one charged.
>
> (3) A crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent.

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(4) An attempt in violation of s. 939.32 to commit the crime charged.

(4m) A crime of failure to timely pay child support under s. 948.22(3) when the crime charged is failure to pay child support for more than 120 days under s. 948.22(2).

(5) The crime of attempted battery when the crime charged is sexual assault, sexual assault of a child, robbery, mayhem, or aggravated battery or an attempt to commit any of them.

(6) A crime specified in s. 940.285(2)(b)4. or 5. when the crime charged is specified in ss. 940.19(2) to (6), 940.225(1), (2), or (3), or 940.30.

(6c) A crime that is a less serious type of violation under s. 940.285 than the one charged.

(6e) A crime that is a less serious type of violation under s. 940.295 than the one charged.

(7) The crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1).

The principle which allows conviction for a lesser included offense upon an information charging a greater offense is that the defendant has received adequate notice of the lesser offense since it does not require proof of any fact not required for the greater.[1]

In order to instruct the jury on a lesser included offense, the offense must qualify under one of the subsections of § 939.66. A trial court is not permitted to instruct or submit a verdict on a lesser crime which is not included in the charged crime.[2] The subsections of § 939.66 are an exhaustive list of the categories of lesser included offenses; if an offense does not fit within one of these categories, it is not "lesser included" and it may not be submitted to the jury.

The subsections of § 939.66 break down into two groups. One group states general principles relating to lesser included offenses that can apply across the range of criminal statutes. Consisting of subsections (1), (2), (3), and (4), this group has been part of the statute since it was originally enacted as part of the 1956 Criminal Code revision. The rest of the subsections constitute the second group which states special rules for specific statutes or groups of statutes. Only subsection (5) was part of § 939.66 as originally enacted. These special rules have become necessary for two reasons. First, the general lesser included offense rules are strictly interpreted to focus solely on the statutorily-defined elements rather

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than on the facts of the case. (See the discussion below.) Second, new criminal statutes tend to be drafted in a way that does not follow the principles of the 1956 Criminal Code revision. The result is that the general principles do not identify offenses that should logically be included offenses, making special rules necessary.

The discussion below considers each of the general rules and then the special rules as a group.

A. Section 939.66(1): "A crime which does not require proof of a fact in addition to those which must be proved for the crime charged."

The key to applying this subsection is understanding that it is concerned with the statutorily required elements of the crimes and not with the particular facts alleged or proved in the case at hand.[3] "When determining whether a crime is a lesser included offense under sec. 939.66(1), the determinative factor is the statutorily defined elements of the respective crimes."[4] Language in earlier decisions of the Wisconsin Supreme Court, especially State v. Melvin,[5] implicitly approving consideration of the peculiar facts of the case in determining lesser included offenses, has not been followed in subsequent cases,[6] and the strict "statutory elements" test now appears to be clearly established.

In properly applying § 939.66(1), one must compare the statutory definition of the charged crime with the statutory definition of the alleged lesser included crime. If the lesser crime includes any element not included in the definition of the charged crime, the lesser crime is not an "included" offense.

Thus, in Randolph v. State,[7] where the facts involved the shooting of the victim by the defendant, it was held that injury by conduct regardless of life and reckless use of a weapon were not included in the crime of attempted murder. Both the lesser offenses require proof of facts not required for attempted murder. Injury by conduct regardless of life requires proof of injury; reckless use of a weapon requires proof that a weapon was used. Attempted murder requires proof of neither injury nor use of a weapon, although both facts were part of the case against Randolph.

Other illustrations of the "statutory elements" test are found in the following cases:

• State v. Verhasselt[8] – injury by negligent use of a weapon is not included within injury by conduct regardless of life;

• State v. Smith[9] – pointing a weapon is not included within armed robbery;

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• State v. Driscoll[10] – indecent liberties with a child is not included within sexual intercourse with a child;

• State v. Elbaum[11] – resisting an officer is not included within battery to a police officer.

• State v. Hagenkord[12] – injury by conduct regardless of life is not an included offense when the charge is first degree sexual assault.

• State v. Carrington[13] – reckless use of a weapon, in violation of § 941.20(1)(a) is not a lesser included offense of endangering safety while armed, in violation of § 941.30 and § 939.63(1).

• State v. Peck[14] – possession of a controlled substance is not a lesser included offense of manufacturing a controlled substance.

• State v. Martin[15] – battery is not a lesser included offense of second degree sexual assault [sexual contact] under § 940.225(2)(a).

• State v. Clemons[16] – possession of a controlled substance is not a lesser included offense of first degree reckless homicide under § 940.02(2)(a), causing death by the delivery of a controlled substance.

• State v. Rundle[17] – reckless child abuse causing great bodily harm under § 948.03(3)(a) is not a lesser included offense of intentional child abuse causing bodily harm under § 948.03(2)(b).

In many of these situations, it can be argued that the strict "statutory elements" test leads to an unfair, or at least excessively rigid, result. (Some of the rigidity is relieved by other subsections of § 939.66 which are discussed below.) This rigidity or unfairness is compounded by the fact that the lesser included offense test has also been adopted for the purposes of determining when multiple convictions are possible. See, for example, State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 660 (1971). Under this rule, multiple convictions are allowed whenever one offense is not "included" within the other under the definition of § 939.66.[18]

The "elements only" approach and alternative lesser included offense tests were thoroughly reviewed in State v. Carrington.[19] The Wisconsin Supreme Court reaffirmed the "elements only" test but acknowledged two qualifications. First, a "penalty enhancer" may be considered in determining what the statutory elements of the charged offense are. Thus, a charge of endangering safety by conduct regardless of life, with the addition of the penalty

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enhancer provided in § 939.63 – while possessing or using a dangerous weapon – includes an element of possessing or using a dangerous weapon which becomes part of the lesser included offense analysis. Second, the Carrington decision acknowledged that the charging document may be referred to in one situation: where a statute provides alternative elements, courts should look to the charging document to determine the greater crime to which the elements only test applies.[20]

Wisconsin is not alone in its commitment to the strict statutory elements test. In United States v. Schmuck, 840 F.2d 384 (7th Cir. 1988), the court, en banc, reversed a panel decision and reaffirmed that the strict "comparison-of-the-elements" test is the proper one to use in federal prosecutions in the 7th Circuit. The panel had adopted a more flexible, "inherent relationship" test, which allowed consideration of the facts alleged in the charge and the evidence presented. The en banc opinion held that the elements test is better for three reasons: 1) it is more consistent with the "necessarily included" standard in Rule 31(c) of the Federal Rules of Criminal Procedure; 2) it avoids problems in giving notice to the defendant; and 3) it is consistent with the test used for double jeopardy purposes. The en banc decision was affirmed by the United States Supreme Court, with the Court emphasizing that the comparison-of-the-statutory-elements test is what is required by Rule 31(c). The court also found that the

> elements test is far more certain and predictable in its application than the inherent relationship test . . . [it] permits both sides to know in advance what jury instructions will be available . . . [and] promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of reference.

United States v. Schmuck, 489 U.S. 705, 720-21 (1989)

B. Section 939.66(2): "A crime which is a less serious type of criminal homicide than the one charged."

Section 939.66(2) provides a special standard for homicides: all less serious types of criminal homicide are considered to be included within all more serious types of homicide. The evidence must support the giving of the instruction on the lesser offense, but in the proper case, instruction on any homicide offense could be proper, even though the "statutory elements" test of § 939.66(1) is not satisfied.[21]

This rule can be applied without difficulty in most cases. The Wisconsin Supreme Court has compared the maximum penalties to determine if one homicide is less serious than another. State v. Davis, 144 Wis.2d 852, 425 N.W.2d 411 (1988). Thus, for any given

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homicide offense, all other homicides with lower maximum penalties are included crimes and should be submitted to the jury if the evidentiary standard is satisfied.

Determining when one homicide is "less serious" than another has become more complicated than one would expect it to be because some homicide offenses have the same penalty. For example, both second degree intentional homicide under § 940.05 and first degree reckless homicide under § 940.02(1) are Class B felonies; both second degree reckless homicide under § 940.06 and homicide by intoxicated use of a vehicle under § 940.09(1) are Class D felonies. In State v. Wolske, 143 Wis.2d 175, 420 N.W.2d 60 (Ct. App. 1988), convictions for a count of negligent homicide and a count of homicide by intoxicated use of a vehicle for each victim of the defendant's operation of a boat were upheld. The court held that the crimes have different elements and that since the penalties were the same, one was not "less serious" than the other. The specific situation addressed in Wolske will not recur because penalties have changed. But the same situation can arise with other statutes.

In State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909, the defendant gave a controlled substance to a 17-year-old girl and she died as a result of using the substance. Patterson was convicted of 1st degree reckless homicide under § 940.02(2) and of contributing to the delinquency of a child with death as a consequence under § 948.40(4)(a). The court affirmed the two convictions, concluding the offenses are not "multiplicitous" because they require proof of different facts. Further, the court concluded that contributing to the delinquency of a child with death as a consequence is not a "less serious type of criminal homicide" for purposes of Wis. Stat. § 939.66(2). "Rather than being a homicide statute, Wis. Stat. § 948.40(4)(a) is more akin to other offenses spread throughout the statutes that proscribe certain conduct and impose a more serious punishment where death results. . . [T]he legislature did not intend contributing to the delinquency of a child with death as a consequence to be a type of criminal homicide." Patterson, ¶¶24, 25.

Nonhomicide offenses may also be lesser included offenses of homicides but to so qualify, they must satisfy one of the other subsections of § 939.66.

C. Section 939.66(3): "A crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent."

The threshold requirement for application of § 939.66(3) is that the lesser crime be "the same as" the crime charged, except for the recklessness or intent element. This requirement has been interpreted to involve the same strict comparison of statutory elements that applies under § 939.66(1). Therefore, subsection (3) does not apply where the lesser offense involves any element not contained within the charged offense.[22] For example, first degree

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reckless injury, requiring "criminal recklessness" and "utter disregard for human life" is not the "same crime" as aggravated battery and does not meet the test under sub. (3).[23]

The second requirement for the application of subsection (3) is that the charged offense must require a showing of criminal intent. Under the Criminal Code, when criminal intent is an element of a crime it is indicated by the terms "intentionally," "with intent to," "with intent that," or by forms of the verbs "know" or "believe."[24] If none of these "intent words" appear in the statute defining the greater offense, subsection (3) does not apply.[25]

A third requirement for the application of subsection (3) is that the lesser offense require "recklessness or negligence." When recklessness is an element of a crime, it is indicated by the term "reckless" or "recklessly." See § 939.24(2). When criminal negligence is an element of a crime, it is indicated by the term "negligent." See § 939.25(2).

D. Section 939.66(4): "An attempt in violation of § 939.32 to commit the crime charged."

An attempt to commit the charged crime is always a lesser included offense under subsection (4). An implicit qualification on this rule is that the attempt must in fact be a crime. This qualification was recognized by the Wisconsin Supreme Court in State v. Melvin,[26] where the court held that a defendant was not entitled to an instruction on attempted homicide by reckless conduct because there was no such offense; one cannot attempt to commit a crime which only requires reckless conduct.[27]

Note that several crimes are defined to punish an attempt equally with the completed crime: § 161.41, Possession of a Controlled Substance; §§ 940.41-.49, Intimidation of Witnesses and Victims; § 948.07, Child Enticement; and § 948.605(3), Discharge of Firearm in a School Zone. In these situations, of course, the attempt is not lesser included with respect to the completed crime.

E. The crime-specific provisions.

Several subsections of § 939.66 declare specific offenses to be included crimes of other offenses. These have become necessary to preserve lesser included offenses where they are logically appropriate but where the statutory drafting style and the strict statutory elements test combine to eliminate them. The individual subsections are discussed briefly below.

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1. Section 939.66(2m): "A crime which is a less serious or equally serious type of battery than the one charged."

This provision was created in 1987, apparently in response to the decision in State v. Richards,[28] which applied the strict comparison-of-the-statutory-elements test to hold that simple battery was not a lesser included offense of aggravated battery. Since that time, § 940.19, the principal battery statute, has been extensively revised and numerous special battery statutes have been created. See §§ 940.20, 940.201, 940.203, 940.205, 940.207, and 940.208.

In determining whether one battery offense is "less serious" than another, the appropriate test is probably the same as that used for homicide offenses: comparing the maximum penalties. (See the discussion of § 939.66(2) in section I. B., above.) Note that unlike the similar provision for homicides in § 939.66(2), this subsection includes "equally serious" types of battery – that is, those with the same penalties.

2. Section 939.66(2p): "A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged."

This subsection relates to sexual assault of a child. As amended by 2007 Wisconsin Act 80, § 948.02 defines five first degree offenses [one Class A felony and four Class B felonies], one second degree offense [Class C felony], and one offense involving failure to act by a person responsible for the welfare of a child [Class F felony].

3. Section 939.66(2r): "A crime which is a less serious type of violation under s. 943.23 than the one charged."

This subsection relates to offenses defined in the statute titled, "Operating a Vehicle Without the Owner's Consent." (Included are offenses referred to as "carjacking." See § 943.23(1g).) The maximum penalties are compared to determine whether an offense is "less serious."[29]

4. Section 939.66(4m): "A crime of failure to timely pay child support under s. 948.22(3) when the crime charged is failure to pay child support for more than 120 days under § 948.22(2)."

This subsection relates to the felony nonsupport offense prohibited by § 948.22(2) and the misdemeanor offense defined in sub. (3) of the same statute. The distinguishing feature is the duration of the failure to pay support: if it is 120 days or more, the offense is a felony; if less than 120 days, the offense is a misdemeanor.

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5. Section 939.66(5): "The crime of attempted battery when the crime charged is sexual assault, sexual assault of a child, robbery, mayhem, or aggravated battery or an attempt to commit any of them."

Under this subsection, attempted battery is an included offense of sexual assault, sexual assault of a child, robbery, mayhem, and aggravated battery, and of an attempt to commit any of those offenses, even though attempted battery may require proof of elements not contained in the enumerated offenses. The Wisconsin Supreme Court has held that this subsection limits attempted battery as an included offense only of the offenses listed.[30] This may be an overstatement, since attempted battery may well be an included offense of crimes not enumerated in subsection (5) if other subsections of § 939.66 are satisfied. For example, it would be an included crime under subsection (4) where battery is charged.

6. Section 939.66(6): "A crime specified in s. 940.285(2)(b)4. or 5. when the crime charged is specified in ss. 940.19(2) to (6), 940.225(1), (2), or (3), or 940.30."

The "crime[s] specified in s. 940.285(2)(b)4. or 5." are misdemeanor offenses involving abuse of individuals at risk. This provision makes them included offenses of felony battery crimes [§ 940.19(2) to (6)], first, second, and third degree sexual assault [§ 940.225(1), (2), or (3)], and false imprisonment [§ 940.30].

7. Section 939.66(6c): "A crime that is a less serious type of violation under s. 940.285 than the one charged."

Section 940.285 defines several different offenses involving the abuse of individuals at risk. The maximum penalties are compared to determine whether an offense is "less serious."[31]

8. Section 939.66(6e): "A crime that is a less serious type of violation under s. 940.295 than the one charged."

Section 940.295 defines several different offenses involving the abuse and neglect of patients and residents of various facilities. The maximum penalties are compared to determine whether an offense is "less serious."[32]

9. Section 939.66(7): "The crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)."

"The crime specified in s. 940.11(2)" is hiding or burying a corpse; the "crime specified in s. 940.11(1)" is mutilating, disfiguring, or dismembering a corpse.

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II. If an offense is "lesser included," when is it proper to submit an instruction on that offense?

Once it has been determined that a crime is a lesser included offense of the charged crime, the trial judge must decide whether the evidence warrants the giving of the instruction. The evidentiary standard is necessary because juries are not to be given the discretion to pick and choose the offense of which the defendant should be found guilty.[33] "Juries cannot rightly convict of the lesser merely from sympathy or for the purpose of reaching an agreement. They are bound by the evidence. . . ."[34]

A. The general rule.

The evidentiary standard for determining when the instruction on the lesser crime should be given was stated as follows in Zenou v. State:

> . . . . if the evidence, in one reasonable view, would suffice to prove guilt of the higher degree beyond a reasonable doubt, and if, under a different, but reasonable view, the evidence would suffice to prove guilt of the lower degree beyond a reasonable doubt, but leave a reasonable doubt as to some element included in the higher degree but not in the lower, the court should, if requested, submit the lower degree as well as the higher.[35]

The court in Zenou went on to describe why the lesser included offense instruction is proper when this test is met:

> . . . . Both the state and the defendant have a right to have the lower degree submitted so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree. Ordinarily, if a court is in doubt, it should submit both degrees upon request.[36]

The test has been upheld in the face of a challenge to its constitutionality. In Ross v. State,[37] the court rejected the defendant's contention that an instruction should be given whenever there is any evidence probative of the lesser offense.[38] The court held that the test did not deny the defendant due process by requiring that there be a reasonable basis in the evidence for the instruction on the lesser offense. To add instructions on offenses not supported by a reasonable basis would not be in the defendant's interest, said the court, since it would make compromise verdicts more likely in cases where acquittal would otherwise have been proper.

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In State v. Bergenthal, the court elaborated on the application of the evidentiary standard:

> The key word in the rule is "reasonable." The rule does not suggest some near automatic inclusion of all lesser but included offenses as additional options to a jury. Only if "under a different, but reasonable view," the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower, should the lesser crime also be submitted to the jury. However, there is not to be read into the rule the requirement that "there are not reasonable grounds on the evidence to convict of the greater offense." That goes too far. Where the defendant is able to demonstrate that there is no reasonable view of the evidence that warrants conviction on the greater offense, and the trial court agrees, there remains no issue on such charge to go to the jury. The purpose of multiple verdicts is to cover situations where under different, but reasonable, views of the evidence there are grounds either for conviction of the greater or of the lesser offense. The lesser degree verdict is not to be submitted to the jury unless there exists reasonable grounds for conviction of the lesser offense and acquittal on the greater.[39]

There are, therefore, two requirements established by the evidentiary standard: 1) reasonable grounds for acquittal on the offense charged (and on other instructed offenses greater than that requested); 2) reasonable grounds for conviction on the lesser offense requested. In assessing the "reasonableness," the evidence should be viewed in the light most favorable to the defendant.[40]

In homicide cases, where all less serious types of homicide are included crimes under § 939.66(3), there must be reasonable grounds for acquittal on all degrees of homicide which are more serious than the offense on which an instruction is requested.[41] However, in at least one situation, full application of this test is not necessary: where the evidence supports instructing on the complete privilege of self defense, an instruction on "imperfect self defense" should always be submitted on request.[42] Thus, in a case where first degree intentional homicide is charged and the evidence supports submitting the complete privilege of self defense, an instruction on second degree intentional homicide under § 940.01(2)(b) (unnecessary defensive force) is always appropriate. A similar situation occurs where first degree intentional homicide is charged and the evidence supports an instruction on the defense of voluntary intoxication: it is error to refuse to instruct on first degree reckless homicide as a lesser included offense.[43]

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B. A "reasonable view of the evidence" and inconsistent defenses.

Questions may arise in applying the general evidentiary rule in cases where submitting the lesser included offense appears to be inconsistent with defense testimony or the apparent defense theory of the case. For example, should a lesser offense involving recklessness be submitted where a defendant charged with an intentional crime claims to have acted in self defense? Or, should a lesser offense be submitted where the defense is entirely exculpatory?[44]

In the Committee's judgment, these questions are best resolved by applying the general test to all the evidence by deciding whether a reasonable view of the evidence supports any lesser included offense instruction that is requested. Trial courts "must recognize the fact that a jury could disbelieve the defendant's version of the facts."[45] Courts should look at all the evidence and the reasonable inferences it supports to determine what offenses are supported by different, but reasonable, views of that evidence.[46]

In State v. Thomas,[47] the Wisconsin Court of Appeals stated this rule in the following way:

> We hold that the defendant or the state may request and receive lesser included offense instructions, even when the defendant has given exculpatory testimony, if under a reasonable but different view of the record, the evidence and any testimony other than that part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge.

III. The necessity of a request for a lesser included offense instruction; the trial judge's sua sponte authority or obligation to give such an instruction.

A. The general rules.

Wisconsin case law establishes three general rules relating to the trial judge's duty and authority to instruct on lesser included offenses. Assuming that an offense qualifies as "included" under § 939.66 and that the evidentiary test is satisfied, the following rules apply.

First, it is error not to submit the lesser included offense if requested by the state or the defendant.[48] Both the state and the defendant have the right to request that a lesser offense be submitted, "so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree."[49] If

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the state requests an instruction on a lesser included offense and the evidentiary test is met, an instruction is required, even if the defendant opposes it.[50]

Second, in the absence of a request by the state or the defendant, it is not error for the trial court to fail to instruct on a lesser included offense.[51] This is the general rule for all sua sponte instructions in Wisconsin[52] and contrasts with the duty of California trial judges, for example, who must instruct on all "general principles of law" even in the absence of a request.[53] In California this duty extends to lesser included offenses[54] and is apparently intended to protect the defendant from incompetent counsel.[55]

Third, if no request has been made, Wisconsin trial courts apparently have the authority, as opposed to the duty or obligation, to instruct on a lesser included offense. The Wisconsin Supreme Court has held that "(t)he determining of instructions is not entirely within the control of the defendant because the court may without any request instruct on the degrees of the offense the evidence will sustain. . . ."[56]

While these general rules sound clear, reconciling them with each other and with other principles raises some difficult issues.

B. No duty to instruct sua sponte versus "plain error."

The Wisconsin rule appears to eliminate the trial judge's obligation to give lesser included offense instructions sua sponte,[57] but this may not be the case in practice. This is because failure to instruct, even in the absence of a request, may be reviewed by an appellate court and may be grounds for reversal where it amounts to "plain error."[58] Further, instructions which "misstate the law" may also be reviewed in the absence of proper objection.[59] It is likely that the failure to instruct on a lesser included offense that is fairly raised by the evidence could be characterized as "affecting substantial rights" or that instructions which omit a fairly raised lesser included offense could be characterized as "misstating the law." Thus, although the Wisconsin trial judge is not specifically required to give an instruction on a lesser included offense in the absence of a request, it may be a good idea for the judge to explore the issue in a proper case. The possible problems with doing so are discussed below.

C. Sua sponte instructions versus trial strategy.

One of the primary reasons for the Wisconsin rule requiring a request for a lesser included offense instruction is the recognition that requesting or not requesting a lesser included offense instruction is largely a matter of trial strategy.[60] The theory is that the defendant may choose to test the state's evidence on the greater offense and take the chance that it will be found to be insufficient, requiring an acquittal. For the trial judge to instruct

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on an included crime where the defendant has chosen to go "all or nothing" on the charged crime alone may raise questions of unfair interference with trial strategy.

D. Anticipating problems at the instruction conference.

The Committee recommends that the possible problems regarding the submission of lesser included offenses be anticipated and dealt with at the instruction conference. The defendant must be present; the conference must be recorded and should raise all appropriate considerations. It is good practice to ask the state and the defendant if instructions on lesser included offenses are requested.[61] If requests are not made for offenses that the trial judge believes may be raised by the evidence, specific inquiry should be made regarding the defendant's strategic decision not to request submission of that offense. The Committee recommends that the defendant be addressed personally in this regard even though the Wisconsin Supreme Court has held that a defendant is bound by counsel's decision not to request an instruction.[62] Given the potential importance of the decision[63] and the close relationship of the judge's sua sponte instruction authority[64] to the need to protect defendants from ineffective counsel, it may be significant to have the record indicate that the defendant fully participated in the decision.[65]

IV. Instructing the jury on the transition between the charged crime and a lesser included crime.

Wis JI-Criminal 112 and 122[66] offer suggested uniform instructions for the transition between the instruction on the charged crime and the instruction for a lesser included crime. The specific issue with which these instructions deal is what result must be reached with regard to the charged crime before moving on to the included crime. The objective is to advise the jury of its options without having any coercive effect on free deliberation.

Wis JI-Criminal 112 and 122 resolve the issue by advising the jury to make every reasonable effort to reach unanimous agreement on the charged crime before moving on to the lesser included crime. This advice is contained in the following paragraph:

> You should make every reasonable effort to agree unanimously on your verdict on the charge of (name charged crime) before considering the offense of (name lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the offense of (name charged crime), you should consider whether the defendant is guilty of (name lesser included crime).[67]

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The basis for this instruction is the assumption that it would be error for the instruction to require the jury to be unanimous in finding the defendant not guilty of the charged crime before considering the lesser offense. This conclusion has not been explicitly adopted by the Wisconsin Supreme Court,[68] but is implicit in two earlier decisions[69] and has been adopted in other states.[70]

At the other extreme from requiring unanimity on the charged crime is to allow the jury to consider any of the submitted offenses without regard to sequence. This theory was rejected on the ground that it is reasonable to ask that the jury's attention first be focused on the charged crime.

V. Other issues.

A. Instructing on an offense for which the statute of limitations has run.

In State v. Muenter, 138 Wis.2d 374, 406 N.W.2d 415 (1987), the Wisconsin Supreme Court held that an instruction should be given on a lesser included offense even if the statute of limitations has run on that crime. Muenter was charged with several felonies in violation of the State Banking Code. The jury was instructed on lesser included misdemeanor offenses on which the statute of limitations had run and found the defendant guilty of those misdemeanors. On appeal, the court held that "the running of the statute of limitations does not preclude the jury from reaching a verdict convicting the defendant of a crime; it rather precludes the trial court from entering a judgment of conviction on the finding of guilt."[71] The court concluded that this result does not "work a fraud upon the jury's verdict." The evidentiary support for submitting the lesser included offense must, of course, still exist.[72]

B. Attorney argument regarding lesser included offenses.

In State v. Neuser, 191 Wis.2d 131, 528 N.W.2d 49 (Ct. App. 1995), a conviction was reversed because the prosecutor engaged in improper argument regarding the court's submission of a lesser included offense. The following remarks were made: "As to the lesser included offense, the court did not submit that. The defense requested that and the court granted the request. It's not the court ordering that it be done." 191 Wis.2d 131, 137. The court of appeals held that this statement was improper for two reasons: it misstated the law, and it presumed to speak for the trial court. The court described the proper scope of argument:

> The question of whether a lesser included offense is to be submitted is a legal issue which is resolved between the court and counsel. It does not involve the jury, and the proceedings relative to the question are not played out before the

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jury. With the court having made that decision, it is not within the province of either counsel to opine to the jury why the court may have chosen to do so. Rather, the role of counsel is to argue whether the evidence supports the greater, the lesser or neither charge.

191 Wis.2d 131, 138.

COMMENT

Wis JI-Criminal SM-6 was originally published in 1980 and revised in 1995. This revision involved a general updating and was approved by the Committee in February 2014.

1. Remington and Joseph, "Charging, Convicting, And Sentencing The Multiple Criminal Offender." 1961 Wis. L. Rev. 528, 546.

2. Clark v. State, 62 Wis.2d 194, 205, 214 N.W.2d 450 (1974).

3. State v. Verhasselt, 83 Wis.2d 647, 266 N.W.2d 342 (1978); Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978); Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973); State v. Smith, 55 Wis.2d 304, 198 N.W.2d 630 (1972).

4. Verhasselt, cited in note 3, supra, at 664.

5. 49 Wis.2d 246, 181 N.W.2d 490 (1970).

6. See cases cited in note 3, supra.

7. 83 Wis.2d 630, 266 N.W.2d 334 (1978). Under current law, reckless injury under § 940.23 is the equivalent offense to "injury by conduct regardless of life," the offense at issue in Randolph.

8. 83 Wis.2d 647, 266 N.W.2d 342 (1978).

9. 55 Wis.2d 304, 198 N.W.2d 630 (1972).

10. 53 Wis.2d 699, 193 N.W.2d 851 (1972).

11. 54 Wis.2d 213, 194 N.W.2d 660 (1972).

12. 100 Wis.2d 452, 302 N.W.2d 42 (1981).

13. 134 Wis.2d 260, 397 N.W.2d 484 (1986).

14. 143 Wis.2d 624, 422 N.W.2d 160 (Ct. App. 1988).

15. 156 Wis.2d 399, 456 N.W.2d 892 (Ct. App. 1990).

16. 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991).

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17. 166 Wis.2d 715, 480 N.W.2d 518 (Ct. App. 1992).

18. See a full critique of the strict test of Randolph in NOTE: Criminal Law – Critique of Wisconsin's Lesser Included Offense Rules 1979 Wis. L. Rev. 896.

19. 134 Wis.2d 260, 397 N.W.2d 484 (1986).

20. 134 Wis.2d 260, 271, citing State v. Hagenkord, 100 Wis.2d 452, 482-83, 302 N.W.2d 421 (1981).

21. Harris v. State, 68 Wis.2d 436, 441, 228 N.W.2d 645 (1975).

22. State v. Randolph, cited in note 3, supra.

23. State v. Eastman, 185 Wis.2d 405, 518 N.W.2d 257 (Ct. App. 1994). The same result was reached under prior law, where cases held that the "conduct evincing a depraved mind" standard failed to meet the test under sub. (3) because the standard was distinct from, and not a species of, recklessness or negligence. See State v. Randolph, cited in note 3, supra; and State v. Weso, 60 Wis.2d 404, 407-410, 210 N.W.2d 442 (1973).

24. Wis. Stat. § 939.23(1).

25. Under the pre-1989 homicide statutes, cases had held that if the charged offense contained the "conduct evincing a depraved mind" standard, subsection (3) does not apply, because that standard does not embody criminal intent. See, for example, State v. Verhasselt, cited in note 3, supra. The same result occurs under current law, where it is clear that first degree reckless offenses are crimes involving "criminal recklessness," which is clearly defined as requiring awareness of the risk, not criminal intent. See § 939.24.

26. 49 Wis.2d 246, 181 N.W.2d 490 (1970).

27. Note that recklessly endangering safety under § 941.30 provides the equivalent to an attempt to commit reckless homicide or reckless injury: the conduct is the same in the sense of creating an unreasonable and substantial risk and the mental state – awareness of the risk – is the same, but death or injury need not be caused; it is sufficient that the safety of another be endangered.

28. State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985).

29. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

30. State v. Melvin, 49 Wis.2d 246, 181 N.W.2d 490 (1970).

31. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

32. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

33. Weisenbach v. State, 138 Wis. 152, 119 N.W. 843 (1909).

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34. State v. Melvin, 49 Wis.2d 246, 253, 181 N.W.2d 490 (1970).

35. Zenou v. State, 4 Wis.2d 655, 668, 91 N.W.2d 208 (1958).

36. Zenou, 4 Wis.2d 655, 91 N.W.2d 208 (1958). This standard has been cited with approval in many subsequent decisions of the Wisconsin Supreme Court. See, for example, State v. Bergenthal, 47 Wis.2d 668, 178 N.W.2d 16 (1970); State v. Anderson, 51 Wis.2d 557, 560, 187 N.W.2d 335 (1971); Day v. State, 55 Wis.2d 756, 759, 201 N.W.2d 42 (1972); State v. Garcia, 73 Wis.2d 174, 242 N.W.2d 919 (1976).

37. 61 Wis.2d 160, 211 N.W.2d 827 (1973).

38. The defendant in Ross relied on the more liberal rule that applies in at least some federal courts, that the lesser offense should be submitted where there is "any evidence . . . however weak . . . tending to bear upon the issue of the lesser included offense." Belton v. United States, 382 F.2d 150, 155 (D.C. Cir. 1967).

39. State v. Bergenthal, 47 Wis.2d 668, 675, 178 N.W.2d 16 (1970).

40. Garcia v. State, 73 Wis.2d 174, 186, 242 N.W.2d 919 (1976); Ross v. State, 61 Wis.2d 160, 211 N.W.2d 827 (1973).

41. Harris v. State, 68 Wis.2d 436, 228 N.W.2d 645 (1975); Jones (George Michael) v. State, 70 Wis.2d 41, 233 N.W.2d 430 (1975).

42. State v. Gomaz, 141 Wis.2d 302, 310, 414 N.W.2d 626 (1987).

43. State v. Brown, 118 Wis.2d 377, 348 N.W.2d 593 (Ct. App. 1984), reached this conclusion under pre-1989 Wisconsin homicide law with regard to what was then first and second degree murder. The same result would occur under current statutes. But see State v. Holt, 128 Wis.2d 110, 382 N.W.2d 679 (Ct. App. 1985), holding that if there really was not sufficient evidence to support the intoxication instruction, the instruction on the less serious degree of homicide is not required.

44. These sorts of questions were discussed in two decisions of the Wisconsin Supreme Court. See State v. Sarabia, 118 Wis.2d 655, 348 N.W. 2d 527 (1984), and State v. Johnnies, 76 Wis.2d 578, 251 N.W.2d 807 (1977). Also see State v. Simpson, 125 Wis.2d 375, 373 N.W.2d 673 (Ct. App. 1985), on reconsideration of 118 Wis.2d 454, 347 N.W.2d 920 (Ct. App. 1984).

45. State v. Gomaz, 141 Wis.2d 302, 308, 414 N.W.2d 626 (1987); State v. Sarabia, 118 Wis.2d 655, 663, 348 N.W.2d 527 (1984).

46. See Dickey, Schultz, and Fullin, The Importance of Clarity in the Law of Homicide, 1989 Wis. L. Rev. 1323, 1391.

47. 128 Wis.2d 93, 107, 381 N.W.2d 567 (Ct. App. 1985). For other cases applying this evidentiary rule, see State v. Seibert, 141 Wis.2d 753, 416 N.W.2d 900 (Ct. App. 1987), and State v. Simpson, cited in note 44, supra.

48. Neunfeldt v. State, 29 Wis.2d 20, 138 N.W.2d 25 (1965).

49. Zenou v. State, 4 Wis.2d 655, 668, 91 N.W.2d 208 (1958).

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50. State v. Fleming, 181 Wis.2d 546, 510 N.W.2d 837 (Ct. App. 1993). Indications by the prosecution before and during trial that a lesser included offense instruction would not be requested are not binding in the absence of a formal agreement or stipulation.

51. Neunfeldt v. State, 29 Wis.2d 20, 138 N.W.2d 25 (1965).; Williamson v. State, 31 Wis.2d 677, 143 N.W.2d 486 (1966); Green v. State, 38 Wis.2d 361, 156 N.W.2d 477 (1968).

52. See, for example, Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978).

53. People v. Wade, 348 P.2d 116 (1959).

54. People v. Sedeno, 518 P.2d 913 (1974); People v. Flannel, 603 P.2d 1 (1979); People v. Wickersham, 650 P.2d 311 (1982).

55. People v. Wade, 348 P.2d 116 (1959).

56. Neunfeldt v. State, 29 Wis.2d 20, 32, 138 N.W.2d 25 (1965). Also see State v. Amundson, 69 Wis.2d 554, 230 N.W.2d 775 (1975), where the giving of an instruction on the defense of entrapment, sua sponte, was upheld even though the defendant objected to the giving of the instruction.

57. See cases cited in note 51, supra.

58. Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978). Also see Virgil v. State, 84 Wis.2d 166, 189-90, 267 N.W.2d 852 (1978) for the definition of "plain error" adopted by the Bergeron decision.

59. Wray v. State, 87 Wis.2d 367, 373, 275 N.W.2d 731 (1978); Lambert v. State, 73 Wis.2d 590, 607, 243 N.W.2d 524 (1976).

60. Turner v. State, 64 Wis.2d 45, 218 N.W.2d 502 (1974).

61. Finalizing the instructions at the instruction conference may help to avoid the issue addressed in State v. Thurmond, 2004 WI App 49, 270 Wis.2d 477, 677 N.W.2d 655. Thurmond was tried before a jury on charges of first degree sexual assault, kidnapping, and attempted armed robbery. During deliberations that lasted for two days, the jury forwarded several questions to the judge; the judge reinstructed on reasonable doubt and later gave Wis JI-Criminal 520. After the jurors indicated they had reached agreement on one count, the state requested an additional instruction on second degree sexual assault and attempted "un-armed" robbery. The jury returned verdicts finding the defendant guilty of second degree sexual assault and kidnapping, and not guilty of attempted robbery. The court of appeals reversed the convictions, relying primarily on the likelihood that the jury may have believed that the trial court was recommending the finding of guilt to the lesser included offenses. And, the fact that the verdict came relatively quickly after the additional instructions were given suggests that the jury failed to thoughtfully consider the lesser included offenses. The court did not adopt a per se rule prohibiting giving lesser included offense instructions in this situation and noted it could find little guidance in Wisconsin law on this question.

62. Green v. State, 38 Wis.2d 361, 156 N.W.2d 477 (1968).

63. In homicide cases in particular, the lesser included offense issue may be almost as important as guilt or innocence. The difference between conviction on first degree intentional homicide (mandatory life imprisonment) and on second degree intentional homicide or reckless homicide is obviously great. It should

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be a matter of record that the defendant was fully aware of the consequences of not requesting a lesser included offense instruction in a homicide case.

Added support for the suggestion that the trial judge inquire on the record is offered by the decision of the United States Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980). Beck reviewed the Alabama procedures for imposing the death penalty which included a statutory prohibition on submitting lesser, noncapital offenses to the jury. The Supreme Court held that the Alabama procedure violated the defendant's right to due process, "by introducing a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." 447 U.S. 625, 643. While Beck is concerned with the death penalty, its reasoning should be equally applicable to noncapital cases, at least to the extent of assuring that the defendant has actively participated in and agreed with the decision not to request the submission of lesser included offenses supported by the evidence.

64. The problems discussed here were acknowledged by the Wisconsin Supreme Court in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983). Felton noted the following statement from Price v. State, 37 Wis.2d 117, 130, 154 N.W.2d 202 (1967):

> [T]he battle might be so unequal due to the disparity of the skill of counsel that justice would require, in the unusual case, that such instructions [referring to instructions offered sua sponte] be offered for counsel's consideration.

65. Wisconsin appellate courts have not held that the decision on requesting a lesser included offense instruction is solely for the defendant. Three court of appeals cases have dealt with the issue in the context of claims of ineffective assistance of counsel. In State v. Ambuehl, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988), the defendant sought to establish ineffective assistance of counsel on the ground that defense counsel did not adequately consult with her on the question of requesting an instruction on a lesser included offense. The court rejected the claim but apparently accepted the defendant's argument that the decision on requesting lesser included offense instructions is one for the defendant to make, not defense counsel. Two more recent decisions suggest that the decision is one of trial strategy for defense counsel to make. See State v. Eckert, 203 Wis.2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996): ". . . a defendant does not receive ineffective assistance of counsel where defense counsel has discussed with the client the general theory of defense, and when based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense." Also see, State v. Kimbrough, 2001 WI App 138, 246 Wis.2d 648, 630 N.W.2d 752.

A footnote to the previous version of this special material [c. 1995] cited the commentary to the ABA Standards for Criminal Justice, Standard 4-5.2, (2d ed. 1980), stating that the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. In the current third edition of the standards, the decision on lesser included offenses is not listed as one of those that is for the defendant personally and the comment quoted above has been deleted and replaced with the following: "It is also important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury."

66. Wis JI-Criminal 112 is for cases where there is a single defendant; Wis JI-Criminal 122 is for cases with co-defendants.

67. Wis JI-Criminal 112 (copyright 2000).

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68. The court of appeals discussed this issue in State v. McNeal, 95 Wis.2d 63, 288 N.W.2d 874 (Ct. App. 1980). The defendant challenged a transition instruction that told the jury to consider the lesser included offense only if they found the defendant not guilty of the charged crime. The court held that the defendant had waived the right to challenge the instruction, but then went on to say that the instruction correctly stated the law, citing Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909). The Committee reads Dillon as being concerned primarily with the order in which the offenses are considered and as being implicit support for the approach to transition recommended here. See the discussion in note 68, below.

69. In Payne v. State, 199 Wis. 615, 227 N.W. 258 (1929), the jury foreman specifically asked the trial court whether the jury had to reach unanimous agreement whether the defendant was guilty or not guilty of the charged crime before considering lesser included offenses. On appeal, the defendant claimed the trial judge's response was such that it told the jury unanimous agreement was required. The supreme court held that the trial judge's complete response would not give the jury that impression, implying that there was merit to the defendant's claim that it would have been error to require unanimous agreement before moving to the lesser included offenses.

In Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909), the instructions were described as telling the jury to consider the lesser included offense upon "its failure to find the defendant guilty of some higher degree of offense." In one view, the failure to agree unanimously on guilt on the charged crime is a "failure to find the defendant guilty."

For a more complete discussion of the Committee's conclusion on this issue, see the Comment to Wis JI-Criminal 112.

70. See State v. Ogden, 35 Or. App. 1, 580 P.2d 1049 (1978), and People v. Johnson, 83 Mich. App. 1, 268 N.W.2d 259 (1978).

71. State v. Muenter, 138 Wis.2d 374, 387, 406 N.W.2d 415 (1987).

72. See State v. Wilson, 149 Wis.2d 878, 440 N.W.2d 534 (1989).

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SM-8 JUROR QUESTIONING OF WITNESSES

[WITHDRAWN]

COMMENT

Wis JI-Criminal SM-8 was originally published in 1992. It was withdrawn in 2014 when most of the substance was moved to the Comment to Wis JI-Criminal 57 Instruction On Juror Questioning Of Witnesses.

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SM-10 GRAND JURY PROCEEDINGS

The grand jury in Wisconsin is an institution created and controlled by §§ 968.40 through 968.53. The judge plays a limited role: the judge orders the creation of the grand jury; sees to it that a full grand jury is selected and sworn; instructs the grand jurors before they begin their work; presides over proceedings in which statutory immunity for witnesses is sought; accepts lists of all witnesses called by, progress reports from and indictments returned by the grand jury during its session; takes appropriate action when indictments are returned; and discharges the grand jury.

The procedural and legal aspects of a grand jury proceeding are outlined at CR-46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. This Special Material provides scripted material that is not included in the Benchbook.

I. Swearing in the Grand Jurors

The judge shall administer the following oath[1] to grand jurors before they begin the performance of their duties:

> "You, as grand jurors for the county of _____, do solemnly swear or affirm that you will diligently inquire as to all matters and things which come before this grand jury; that you will keep all matters which come before this grand jury secret; that you will indict no person for envy, hatred or malice; that you will not leave any person unindicted for love, fear, favor, affection or hope of reward; and that you will indict truly, according to the best of your understanding."

II. Swearing in the Court Reporters

The judge must administer to each reporter and assistant the following oath:

> "Do you solemnly swear that you will faithfully record and transcribe all the proceedings before the grand jury and keep secret the matter relative to such proceedings?"[2]

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III. Charge to the Grand Jury

It is the duty of the court to instruct the grand jury.[3] The following is recommended.

"The function of the grand jury is not to determine guilt or innocence but rather to investigate possible violations of the criminal law and decide whether the person or persons about whom evidence is presented should be brought to trial. The only job of the grand jury is to return indictments and, if such is appropriate, to report its progress to the court.[4] These progress reports, if any, must be prepared and limited so as not to violate the secrecy rule, and unless so limited, they may not be received by the court.

"Your first duty is to select a presiding juror and a clerk. It shall be the duty of the clerk to preserve the minutes of the proceedings and all exhibits.[5]

"All 17 jurors must attend each session unless excused by the presiding juror for good and sufficient reason.[6]

"No business may be transacted by the grand jury unless at least 14 members are in attendance.[7]

"It is the duty of the district attorney of the county to attend your grand jury sessions whenever the jury so desires for the purpose of examining witnesses in your presence, giving you advice upon any legal matter, issuing subpoenas and other process to bring witnesses before you and helping to draw bills of indictment.[8]

"It is the duty of the presiding juror to return to the judge a list, signed by the presiding juror, of all witnesses who are sworn before the grand jury.[9]

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"All witnesses brought before the grand jury shall be put under oath. The presiding juror, the district attorney, or other prosecuting officer shall have the authority to administer such oath.[10]

"Any witness subpoenaed to appear before you has the right to confer with and obtain the legal advice of an attorney.[11] Although the attorney is not entitled to be present during the questioning before the grand jury, the witness should be allowed to confer with the attorney outside the jury room whenever the witness so desires.[12] Any witness also has the privilege against self-incrimination granted by the Fifth Amendment to the United States Constitution. Pursuant to that privilege, the witness may refuse to answer questions before the grand jury. It is the job of the district attorney and the court to decide whether the witness has properly invoked that privilege.

"Any witness should be advised by the prosecuting officer(s) that the witness has a privilege against self-incrimination and has the right to confer with counsel. Such advice should appear on the grand jury record.[13]

"All grand jury deliberations are to be secret, and no one is permitted to be present at your sessions except the jury, the official sworn reporter(s) and typist(s), the prosecuting officer(s), the witness under examination, and a duly sworn interpreter, if one is required.

"The primary duty of the grand jury is to weigh the evidence against the accused. If the evidence 'excites in your minds after careful consideration an honest reasonable belief that the accused committed the offense charged,'[14] you the grand jury may return an indictment of the accused for the offense charged. Only such evidence as is presented during the grand jury sessions shall be considered. You

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should not subject yourselves to the opinions or accounts of other persons, of the media, or of any other source regarding such evidence. No indictment shall be returned unless at least 12 grand jurors concur therein.[15]

"No grand juror shall be allowed to state or testify in court in what manner he or she or any other member of the jury voted on any question before you, or what opinion was expressed by any juror in relation to any question.[16]

"No grand juror or officer of the court shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until the person has been arrested.[17]

"The grand jurors normally serve for a period of 31 consecutive days, unless more days are necessary to complete service. The court may discharge the grand jury at any time.[18]

"When the grand jury is discharged, all transcripts of testimony, minutes of proceedings, exhibits and other records of the grand jury shall be collected by the clerk of the grand jury and delivered, as the jury directs, either to the attorney general or to the district attorney, or, upon approval of the court, to the clerk of the court who shall impound them subject to further order or orders of the court."[19]

IV. Inquiry When a Witness Claims the Privilege Against Self-Incrimination; Grants of Immunity

The judge presides over proceedings relating to the assertion of the privilege against self-incrimination. See Special Material 55 for an outline of a suggested procedure.

COMMENT

SM-10 was originally published in 1974, withdrawn in 1993, and republished in 1995. This revision updated statutory references and was approved by the Committee in December 2003.

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This Special Material was withdrawn in 1993 because procedures for grand juries are outlined at CR 46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. It was restored because it provides scripted material that is not included in the Benchbook.

1. The oath is based on § 968.41, which specifies the content of the oath which must be administered.

2. Section 968.43(2) requires that "[b]efore assuming the duties prescribed in this section, each reporter shall make and file an oath faithfully to record and transcribe all the proceedings before the grand jury and to keep secret the matters relative to the proceedings." The oath recommended follows this statutory language. Violation of the oath is punishable as a Class H felony. § 968.43(3).

3. State v. Lawler, 221 Wis. 423, 427, 267 N.W. 65 (1936), states that ". . . it is the duty of the court to instruct the [grand] jury. . . ."

4. In re Grand Jury Report, 204 Wis. 409, 235 N.W. 789 (1931).

5. Section 968.42. These minutes and exhibits are not a matter of public record. Havenor v. State, 125 Wis. 444, 104 N.W. 116 (1905).

6. Section 968.48. There are to be at least 17 qualified jurors on the grand jury. Section 968.40(4).

7. Section 968.48.

8. Sections 968.47 and 978.05(4).

9. Section 968.44 refers to "witnesses who are sworn before the grand jury." It is sufficient that witnesses give an affirmation rather than an oath. § 906.03.

10. Section 968.44.

11. Section 968.45(1) provides in part as follows:

> Any witness appearing before a grand jury may have counsel present, but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. Counsel may consult with his or her client while before a grand jury.

It is generally conceded that a witness has no constitutional right to the assistance of counsel at the grand jury proceeding. A plurality opinion in United States v. Mandujano, 425 U.S. 564 (1976), held that the right to counsel under the 6th Amendment does not apply at the grand jury because no criminal proceedings have been instituted. Federal courts of appeals have held that the right to counsel does not attach at grand jury proceedings. See, for example, United States v. Ramsey, 785 F.2d 184, 193 (7th Cir. 1986).

12. Section 968.45.

13. At this point, the former version of SM-10 provided special advice for "target witnesses." Special warnings are not required for "targets"; the general advice regarding the privilege against self-incrimination is sufficient. United States v. Washington, 431 U.S. 181 (1977). [Also seeState v. Ryan, 79 Wis.2d 83, 255 N.W.2d 910 (1977): a John Doe witness is not entitled to a "target witness" warning.]

14. State v. Lawler, note 3, supra, at 435.

15. Section 968.48.

16. Section 968.52.

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17. Section 968.51.
18. Section 968.40(6).
19. Section 968.505.

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SM-12 JOHN DOE PROCEEDINGS

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Scope

The Wisconsin John Doe proceeding is a criminal investigatory inquiry provided for by § 968.26. Its purpose is to ascertain whether a crime has been committed and by whom. Only a judge may conduct a John Doe proceeding. The judge has the power to subpoena and examine witnesses and to determine the extent of the examination.

The procedural and legal aspects of a John Doe proceeding are outlined at CR-46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. This Special Material provides scripted material that is not included in the Benchbook.

I. Instruction to a Witness[1]

After administering the oath or affirmation, the judge should address the witness as follows or direct the prosecutor to do so.[2]

A. Introduction

"You are advised that you are appearing in a John Doe proceeding before (me) (Judge _____) as Circuit Court Judge for _____ County.

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"Under Wisconsin law, the circuit judge has the power to subpoena witnesses and compel testimony before this John Doe. You are directed to answer all questions put to you, remembering your oath or affirmation.

"If you believe that a truthful answer to any question asked of you would incriminate you, that is, subject you to criminal prosecution, you may refuse to answer the question on the grounds that it may incriminate you.[3] Do you understand that?

"Do you understand that your answers to questions put to you may be used against you by this John Doe or in another legal proceeding?

"Do you understand that if you testify falsely you may be criminally prosecuted for perjury or false swearing committed during your testimony before this John Doe proceeding?[4]

"Under Wisconsin law, several types of confidential communications are privileged. These include[5] communications between spouses, between a health care provider and patient, between attorney and client, and between a person and a member of the clergy. Do you understand that you may refuse to answer any question asked of you if it would require you to reveal conversations which are privileged by law?

"Do you understand that there are no other lawful grounds upon which you may refuse to answer questions before this John Doe?"

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B. Right to Counsel[6]

"You are also advised that you have the right to have an attorney present with you during your testimony. Further, you may confer with your attorney during your testimony. However, your attorney will not be allowed to ask you questions, cross-examine other witnesses, or argue before the judge. Do you understand that?"

[IF THE WITNESS APPEARS WITH COUNSEL, READ THE "INSTRUCTION TO COUNSEL" PROVIDED BELOW AFTER COMPLETING THE INSTRUCTION TO THE WITNESS.]

[IF THE WITNESS APPEARS WITHOUT COUNSEL, ADD THE FOLLOWING.]

"You are appearing before this John Doe without an attorney. Do you understand that (here identify the prosecutors) represent the state of Wisconsin and may not and cannot act as your attorney? Do you understand that if you do not have an attorney but wish to consult with one about these proceedings or have an attorney appear with you, you will be required to return and testify at a future time? Do you wish to have an attorney present with you at this time? If not, has anyone made any threats or promises to get you to give up your right to consult with an attorney or have an attorney appear with you during this John Doe?"[7]

C. Conclusion

"Your testimony at this proceeding will be recorded word-for-word and will be transcribed. Do you understand that?

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"I am giving you a copy of the instruction which I have just read to you. Do you acknowledge that you have received a copy of this instruction?"

II. Instruction to Attorney Representing a John Doe Witness

The following should be read to the attorney who appears with a witness subpoenaed before the John Doe.[8]

"(Name of witness) appears with Attorney _____. Attorney _____, you are advised that you are subject to the restrictions set forth in § 968.26(3)(c) of the Wisconsin Statutes.

"Section 968.26(3)(c) allows a witness subpoenaed before a John Doe proceeding to have counsel present at the examination. However, you may not examine your client, cross-examine other witnesses, or argue before the judge.

"If your client wishes to consult with you before answering any question, your client may do so off the record."

III. Order of Secrecy[9]

[ADD THE FOLLOWING IF A SECRET JOHN DOE PROCEEDING HAS BEEN AUTHORIZED.]

"Under Wisconsin law, a circuit judge may order that a John Doe proceeding be secret. That has been done in this case. You are ordered to maintain the secrecy of this John Doe proceeding and to inform no one of the questions asked, the answers given, or any other matters observed or heard during this proceeding.

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Violation of this secrecy order may be subject to a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.[10]

"You are now being given a copy of the Order of Secrecy. Do you acknowledge receipt of this Order of Secrecy?"

IV. Inquiry When a Witness Claims the Privilege Against Self-Incrimination; Grants of Immunity

The judge presides over proceedings relating to the assertion of the privilege against self-incrimination. Section 968.26(3)(d) provides: "A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08(1). The person is immune from prosecution as provided in s. 972.08(1), subject to the restrictions under s. 972.085." Note that while a John Doe proceeding is conducted by a judge, the compelling of testimony and granting of immunity is undertaken by a court. See Special Material 55 for recommended procedures for compelling testimony, evaluating a claim of the privilege against self-incrimination, and the granting of immunity.

COMMENT

SM-12 was originally published in 1974, withdrawn in 1993, and republished in 1995. It was revised in 1999, 2007, 2009, 2010, and 2011. This revision reflects extensive changes to John Doe procedure made by 2015 Wisconsin Act 64 and was approved by the Committee in June 2019.

This Special Material was withdrawn in 1993 because procedures for John Doe proceedings are outlined at CR 46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. It was restored after being revised to provide scripted material that is not included in the Benchbook.

2015 Wisconsin Act 64 [effective date: October 25, 2015] made extensive changes in the standards and procedures for John Doe investigations. Among the most significant:

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- the crimes that may be investigated are limited to specified felonies

  - Class A, B, C, or D felony under chs. 940 to 948 or 961 – § 968.26(1b)(a)1.
  - violation of listed statutes if a Class E, F, G, H, or I felony penalty applies – § 968.26(1b)(a)2.
  - other offenses specified in § 968.26(1b)(a)3., 4., or 4m.
  - crimes committed by a law enforcement officer, corrections officer, or state probation, parole, or extended supervision officer if the individual was engaged in his or her official duties at the time – § 968.26(1b)(a)5.

- secrecy orders apply only to the judge, the district attorney or other prosecuting attorney who participates in the proceeding, law enforcement personnel admitted to the proceeding, an interpreter who participates in the proceeding, or a reporter who makes or transcribes a record of a proceeding. See footnote 7, below.

- the proceeding may not investigate a crime that was not part of the original request unless "a majority of judicial administrative district chief judges find good cause to add specified crimes and the identification of the vote of each judge is available to the public" – § 968.26(5)(b)

- there is a six-month time limit – § 968.26(5)(a) – which "may be extended only if a majority of judicial administrative district chief judges find good cause for the extension and identification of the vote of each judge is available to the public" – § 968.26(5)(a)2.

- reserve judges may not conduct the proceeding – § 968.26 (1b)(b)

- a judge may issue a search warrant relating to a John Doe proceeding only if the judge is not presiding over that proceeding – § 968.26(5)(c)

Section 968.26 was amended by 2009 Wisconsin Act 24 to provide different procedures for John Doe requests made by district attorneys and requests made by other persons. If a district attorney makes a request, "the judge shall convene a hearing . . ." Section 968.26(1m). If a person other than a district attorney makes a request, "the judge shall refer the complaint to the district attorney . . ." Section 968.26(2)(am). The district attorney must decide within 90 days whether to issue charges or refuse to issue charges. If the district attorney refuses, he or she must forward the records and explanation of the refusal to the "judge in whose jurisdiction the crime was allegedly committed." Section 968.26(2)(b). The judge "shall convene a proceeding . . . if he or she determines that a proceeding is necessary to determine if a crime has been committed." Section 968.26(2)(b).

In State ex rel. Reimann v. Circuit Court, 214 Wis.2d 605, 622, 571 N.W.2d 385 (1997), the Wisconsin Supreme Court held that:

> . . . § 968.26 imposes a threshold requirement on persons filing petitions for John Doe proceedings. Before a circuit court judge's obligation to conduct an examination . . . is triggered, the John Doe complainant must establish that he or she has "reason to believe" that a crime has been committed
> . . . [A] John Doe complainant must do more than merely allege that a crime has been committed . . . [the] complainant . . . must allege objective, factual assertions sufficient to support a reasonable belief that a crime has been committed.

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If the Riemann test is met, the John Doe judge does not have the authority to analyze the merits of the case. Even if the judge "applied his common sense and reasonably concluded that conducting a John Doe would be a waste of time," the John Doe must be held. The John Doe judge is not to assess credibility or choose between competing inferences. State ex rel. Williams v. Fiedler, 2005 WI App 91, ¶2, 282 Wis.2d 486, 698 N.W.2d 294.

The Wisconsin Court of Appeals reviewed § 968.24 as amended by 2009 Wisconsin Act 24 in Naseer v. Miller, 2010 WI App 142, 329 Wis.2d 724, 793 N.W.2d 209:

> We therefore conclude that the same interpretation of the "reason to believe" language relating to the prior statute's examination duty should also apply to the amended statute's referral duty. That is, under the amended statute, a judge has a mandatory duty to refer a John Doe complaint to the district attorney only if the four corners of the complaint provide a sufficient factual basis to establish an objective reason to believe that a crime has been committed in the judge's jurisdiction. ¶11.

Suppression of testimony is not required by statute or constitutional principles where a witness was questioned at the John Doe proceeding by a law enforcement officer who was not licensed to practice law. State v. Noble, 2002 WI 64, 253 Wis.2d 206, 646 N.W.2d 38.

John Doe proceedings are sometimes used in an attempt to secure the issuance of charges where the district attorney has refused to charge. The Wisconsin Supreme Court has upheld the constitutionality of the use of the John Doe statute in that situation. See State v. Unnamed Defendant, 150 Wis.2d 352, 441 N.W.2d 696 (1989). Also see State v. Schober, 167 Wis.2d 371, 481 N.W.2d 689 (Ct. App. 1992), holding that a criminal complaint resulting from a John Doe is subject to the regular standard for deciding whether to grant a prosecution motion to dismiss – whether dismissal "is in the public interest."

In State ex rel. Hipp v. Murray, 2008 WI 67, 310 Wis.2d 342, 750 N.W.2d 873, the court held that a John Doe judge has exclusive authority to subpoena witnesses in a John Doe proceeding; the clerk's general authority to issue subpoenas under § 885.01(1) does not apply. The court also held that the subpoenas should have been issued in this case, but "saved for another day" the issue whether a John Doe judge is required to subpoena every witness that a John Doe petitioner requests. 2008 WI 67, ¶52. [A motion for reconsideration was denied at 2008 WI 118, 314 Wis.2d 67, 756 N.W.2d 34.]

The issue "saved for another day" in State ex rel. Hipp v. Murray, supra, was addressed in State ex rel. Robins v. Madden, 2009 WI 46, 317 Wis.2d 342, 766 N.W.2d 837:

¶2 The issue we address today is whether the judge in a John Doe hearing is required under Wis. Stat. § 968.26 to examine all the witnesses a complainant produces and to issue subpoenas to all the witnesses a complainant wishes to produce. We read the statute as extending judicial discretion in a John Doe hearing not only to the scope of a witness's examination, but also to whether a witness need testify at all. Accordingly, we hold that a judge is not required by § 968.26 to examine all the witnesses a complainant produces at a John Doe hearing, or to subpoena all the witnesses a complainant wishes to produce.

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1. The 2010 version of SM-12 included a warning to a target witness:

> You are now advised that your testimony given here can be used against you in criminal proceedings and to support the issuance of a warrant for your arrest. You can claim the privilege against self-incrimination and you have the right to have counsel present during your testimony and to consult your counsel before answering.

Both federal and state courts have rejected the need to provide investigatory targets with special warnings. The advice given all witnesses adequately apprises them of the privilege against self-incrimination and other rights. United States v. Washington, 431 U.S. 181, 189 (1977); Ryan v. State, 79 Wis.2d 83, 96, 255 N.W.2d 910 (1977).

2. Practice apparently varies with respect to whether the judge reads the advice personally or allows the prosecutor to do so. The material has been drafted to be usable in either situation.

3. In State v. Hanson, 2019 WI 63, ¶35, — Wis.2d —, — N.W.2d —, the Wisconsin Supreme Court concluded that Miranda warnings are not required for a John Doe witness, but recommended that the advice contained here be given:

> A witness at a John Doe proceeding is not subject to custodial interrogation and therefore Miranda warnings are not required. Although we do not require Miranda warnings be given at John Doe proceedings, we recommend a John Doe judge address a witness in accordance with Special Materials 12.

The court noted that this is the case even if the witness happens to be in custody on charges unrelated to the John Doe.

4. Failure to give the witness this advice will not preclude a perjury prosecution. See United States v. Wong, 431 U.S. 174, 178 (1977). However, providing the advice may impress upon the witness the seriousness and importance of the John Doe and may reinforce the obligation to testify truthfully.

5. The list of privileges is not exhaustive. See, for example, § 905.045 Domestic violence or sexual assault advocate-victim privilege. Rather, it is intended to give the witness an idea of what types of communications may be privileged. If there is reason to believe that other privileges may apply, additional description should be given.

6. The right to counsel is provided in § 968.26(3)(c): "Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge."

7. If it appears to be necessary to take a more formal waiver of counsel at this point, see Special Material 30 which provides a model for a full waiver.

"A John Doe judge has the authority to disqualify counsel for a witness in a John Doe proceeding but must ensure that there is a record of that decision for review." Unnamed Persons Numbers 1, 2, and 3 v. State, 2003 WI 30, 260 Wis.2d 653, 660 N.W.2d 260.

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8. See note 5, supra.

9. The rules relating to secrecy orders were significantly changed by 2015 Wisconsin Act 64. The judge's general authority to order that the proceeding be secret was eliminated and replaced by § 968.26(4)(a) which provides:

- a secrecy order may be issued upon a showing of good cause by the district attorney
- a secrecy order applies only to:
  - the judge
  - the district attorney or other prosecuting attorney who participates in the proceeding
  - law enforcement personnel admitted to the proceeding
  - an interpreter who participates in the proceeding
  - a reporter who makes or transcribes a record of a proceeding
- the order may not apply to any other person

The scripted material formerly provided in SM-12 was clearly directed at a witness; it has been revised to reflect the Act 64 changes.

Any secrecy order shall be terminated if any person applies to the judge and establishes that good cause no longer exists – § 968.26(4)(b). If a complaint is filed following a proceeding in which a secrecy order was entered, the order is terminated at the initial appearance and § 971.23 governs disclosure of information from the proceeding – § 968.26(4)(c).

10. See § 968.26(4)(d), created by 2015 Wisconsin Act 64. Prior law provided that violation of the secrecy order was punished as contempt of court.

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SM-15 SUBSTITUTION OF JUDGE

[WITHDRAWN]

COMMENT

SM-15 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Substitution of Judge/Recusal" at CR 6, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-16 COLLATERAL ATTACK ON PRIOR CONVICTIONS

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Scope

Under the current criminal statutes, many criminal offense definitions, penalty enhancers, and penalty schemes are based on the defendant having prior convictions. As these situations become more common, the propriety of a challenge to the validity of the priors in a prosecution for a new crime is an increasingly important issue. This is commonly referred to as "collateral attack" on the prior convictions. It is deemed "collateral" because the challenge comes not in a direct appeal of the original conviction but in the context of a later prosecution.

There are two issues that arise with respect to collateral attack on prior convictions:

(1) What uses of prior convictions require allowing collateral attack?

(2) What types of defects in the prior conviction may be raised in a collateral attack?

I. Collateral Attack Must Be Allowed When Prior Convictions Are Used To Support Guilt Or Enhance Punishment

The standard for determining the uses of prior convictions that require allowing collateral attack may be summarized as follows:

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- when priors are used to support guilt or enhance punishment collateral attack must be allowed;

- when priors are used to "identify members of a potentially dangerous class" a defendant may **not** collaterally attack a prior.

This difficult distinction was articulated by the United States Supreme Court in Lewis v. United States, 445 U.S. 55 (1980). In Lewis, the court held that a federal defendant charged with being a felon in possession of a firearm was not entitled to collaterally attack the prior conviction relied on to establish his felon status. This was based on the distinction that the prior conviction in this situation was used in a way that focused "not on reliability, but on the mere fact of conviction. . . . Enforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment.'" 445 U.S. 55, 67.

The Wisconsin Court of Appeals commented on the Lewis rule in State v. Foust, 214 Wis.2d 568, 573-4, 570 N.W.2d 905 (Ct. App. 1997), calling it an "elusive" distinction and "a conundrum." However, the court found it settled as a matter of state law that prior criminal convictions for operating under the influence used to establish the defendant's present status as, for example, a third-time offender, are used "primarily to enhance punishment." The court relied on State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), which allowed collateral attack on prior criminal convictions for operating after revocation [OAR]. The Baker decision reviewed Lewis and concluded that "the OAR statute uses prior OAR convictions primarily to enhance punishment, not to identify and classify a defendant or enforce a civil disability with a criminal sanction." 169 Wis.2d 49, 64.[1]

So, Baker and Foust make it clear that the use of prior convictions in the state's graduated penalty schemes for operating after revocation and operating under the influence is "primarily to enhance punishment" and thus appropriate for collateral attack. An example of the other category – use to identify the defendant a member of a potentially dangerous class – may be offered by the criminal offense of violating a temporary restraining order or injunction, in violation of § 813.12. The Wisconsin Court of Appeals held that a "defendant cannot collaterally attack the validity of a harassment injunction in a criminal prosecution for the violation of that injunction." State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

This could be characterized as fitting the Lewis "dangerous class" category, although the Bouzek decision does not make that explicit. The nature of Bouzek's challenge is identified only as the injunction being "overly broad" and "improperly issued." It

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probably did not involve a constitutionally-based challenge, thus failing to meet what is characterized here as the second part of the standard.

II. Collateral Attack Is Allowed Only For Claims That The Defendant Was Denied The Right To Counsel At The Time Of The Prior Conviction

Collateral attack is allowed only for claims that the defendant was denied the right to counsel at the time of the prior conviction.[2] Custis v. United States, 511 U.S. 485 (1994); State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528. This includes a claim that the defendant did not knowingly, intelligently, and voluntarily waive his or her constitutional right to counsel. State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92.

In Custis v. United States, 511 U.S. 485 (1994), the United States Supreme Court rejected a claim that the United States Constitution requires allowing collateral attack on grounds of ineffective assistance of counsel and the absence of a knowing and intelligent guilty plea. The court recognized a "sole exception" to the rule prohibiting collateral attacks – convictions obtained in violation of the right to counsel: "failure to appoint counsel for an indigent defendant was a unique constitutional defect." 511 U.S. 485, 496.

The Wisconsin Supreme Court adopted the Custis rule in State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528. Noting that Custis interpreted the federal constitution, the court adopted the same conclusion as a matter of state law:[3]

> Although these administrative considerations may weigh differently in different cases, we conclude that considerations of judicial administration favor a bright-line rule that applies to all cases. We therefore hold that a circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction. Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence. If the offender has no means available under state law to challenge the prior conviction on the merits, because, for example, the courts never reached the merits of this challenge under State v. Escalona-Naranjo, 185 Wis.2d 168, 517 N.W.2d 157 (1994), or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence. We do not address the appropriate disposition of any such application.[4]
> State v. Hahn, 2000 WI 118, ¶28, as modified on reconsideration by 2001 WI 6, ¶2.

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In State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92, the court confirmed that the right to collateral attack extends to claims of invalid waiver of counsel. The standards for a valid counsel waiver are set forth in State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1977). The Klessig standards, though not mandated by the United States Constitution, are required by the Wisconsin Supreme Court as an exercise of its superintending power.[5]

Klessig identified four requirements for a valid waiver of counsel, to be covered in a colloquy conducted by the court. The colloquy must ensure that the defendant:

1) made a deliberate choice to proceed without counsel;
2) was made aware of the difficulties and disadvantages of self-representation;
3) was aware of the seriousness of the charge of charges against him; and,
4) was aware of the general range of penalties that could have been imposed on him.

Klessig, 211 Wis.2d 194, 206. [Cited in Ernst, 2005 WI 107, ¶14.]

For a description of the Klessig requirements and discussion of related issues, see SM-30 Waiver and Forfeiture of Counsel; Self-Representation; Standby Counsel; "Hybrid Representation"; Court Appointment of Counsel.

III. Procedure

In State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92, the court also set forth the procedures to be used when a defendant challenges a prior conviction on a collateral attack. While Ernst was specifically concerned with an alleged deficiency in obtaining a waiver of counsel, the same general procedure would be suitable for a claim that counsel was denied. The procedure is modeled after that used for withdrawal of a plea of guilty. See State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

A. The burden is on the defendant to make a prima facie showing of a constitutional violation

The defendant must allege that the constitutional right to counsel was violated, either by denial of counsel or by failure to obtain a knowing, intelligent, and voluntary waiver of counsel. The allegation must point to specific facts that support the allegation:

> For there to be a valid collateral attack, we require the defendant to point to facts that demonstrate that he or she did not know or understand the information which should have been provided in the previous proceeding and, thus, did not

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> knowingly, intelligently, and voluntarily waive his or her right to counsel. Any claim of a violation on a collateral attack that does not detail such facts will fail.
> Ernst, 2005 WI 107, ¶25 (internal citations omitted).

The Ernst decision also stated that "[a]n affidavit from the defendant setting forth such facts [facts that demonstrated that he or she did not knowingly, intelligently, and voluntarily waive counsel] would be necessary, in order to establish a prima facie case." Ernst, 2005 WI 107, ¶33.

Applying this standard in the Ernst case, the court found that the defendant failed to meet it:

> Ernst made no mention of specific facts that show that his waiver was not a knowing, intelligent, and voluntary one. Instead, Ernst simply relied on the transcript and asserted that the court's colloquy was not sufficient to satisfy Klessig. . . . Since this was a collateral attack, the lack of specific facts resulted in a failure to establish a prima facie case that Ernst did not knowingly, intelligently, and voluntarily waive his right to counsel.
> Ernst, 2005 WI 107, ¶26.

In State v. Bohlinger, 2013 WI App 39, 346 Wis.2d 549, 828 N.W.2d 900, a conviction for 4th offense operating under the influence was reversed and the case remanded for an evidentiary hearing on whether the defendant validly waived counsel during his prosecutions for the 2nd and 3rd offenses. The defendant made a sufficient prima facie showing that because of cognitive disability he did not have the mental capacity to understand the rights he was waiving.

Also see, State v. Hammill, 2006 WI App 128, 293 Wis.2d 654, 718 N.W.2d 747, and State v. Verhagen, 2013 WI App 16, 346 Wis.2d 196, 827 N.W.2d 891, where the court of appeals concluded that the defendant failed to make a prima facie showing.

B. If a prima facie showing is made, an evidentiary hearing should be held, at which the burden shifts to the state

The burden is on the state to prove by clear and convincing evidence that the defendant was not denied the right to counsel or that the defendant's waiver of counsel was knowingly, intelligently, and voluntarily entered.[6] The "court should hold an evidentiary hearing to allow the State an opportunity to meet its burden." Ernst, 2005 WI 107, ¶27.

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C. At the hearing, the state may call the defendant as a witness

Ernst concluded that the collateral attack situation was the same as that where withdrawal of a plea of guilty is sought. The defendant may be called as a witness to shed light on his or her understanding of matters relevant to entering a voluntary and intelligent plea or a voluntary waiver of counsel. Ernst, 2005 WI 107, ¶31.

D. The defendant may not claim the privilege against self-incrimination

If called as a witness, the defendant may not validly claim the 5th Amendment privilege against self-incrimination. Making a prima facie case will require an affidavit from the defendant alleging facts in support of the constitutional violation. Once a defendant successfully makes a prima facie showing, the defendant cannot avoid testifying about circumstances concerning that claim. By raising the issue, the defendant has waived the privilege. Ernst, 2005 WI 107, ¶33. "Finally, if the defendant refuses to testify under these circumstances, a circuit court is free to draw the reasonable inference that the State has satisfied its burden, and that the waiver of counsel was a knowing, intelligent, and voluntary one." Ernst, 2005 WI 107, ¶35.

IV. Common Situations Where the Collateral Attack Issue May Arise

This section lists the situations where the collateral attack issue is addressed by case law or in the published jury instructions. The situations are divided into two categories: those where priors are used to support guilt or enhance punishment and where collateral attack must be allowed; those where priors are used to "identify members of a potentially dangerous class" and where a defendant may **not** collaterally attack the prior. Within the categories, the offenses are listed in the order in which they appear in the statutes. [Some of the examples do not involve prior convictions but rather are based on a prior court order or injunction. The Committee believes the same analysis would apply to the court order/injunction cases.]

A. Priors used to support guilt or enhance punishment – collateral attack must be allowed

1. Prior convictions for operating after revocation – § 343.44

State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), allowed collateral attack on prior criminal convictions for operating after revocation [OAR]. The Baker decision concluded that "the OAR statute uses prior OAR convictions primarily to enhance

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punishment, not to identify and classify a defendant or enforce a civil disability with a criminal sanction." 169 Wis.2d 49, 64.[7]

2. Prior convictions for operating under the influence – § 346.63

In State v. Foust, 214 Wis.2d 568, 570 N.W.2d 905 (Ct. App. 1997), the court found it settled as a matter of state law that prior criminal convictions for operating under the influence used to establish the defendant's present status as, for example, a third-time offender, are used "primarily to enhance punishment." The court relied on State v. Baker, supra. The same should be true for convictions used to support the application of the 0.02 level of alcohol concentration.

3. Prior convictions used under the "habitual criminality" statute ("repeater") – § 939.62

Although there is not a published decision directly on point in Wisconsin, the logic of the cases discussed above is that collateral attack would be allowed with respect to prior convictions used to support a repeater allegation under § 939.62. The United States Supreme Court recognized the propriety of collateral attack in that situation in Burgett v. Texas, 389 U.S. 109 (1967).

4. Prior convictions used under the "persistent repeater" statute ("three strikes") – § 939.62(2m)(b)1.

In State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528, the court allowed collateral attack on a prior conviction used as the basis for a "persistent repeater" or "three strikes" determination under § 939.62(2m)(b)1.

5. Prior convictions used at sentencing

In United States v. Tucker, 404 U.S. 443 (1972), the United States Supreme Court held that convictions obtained in violation of the right to counsel could not be relied on as prior convictions at sentencing in a later prosecution.[8] That the priors were obtained in violation of the right to counsel had been established in a collateral attack in the state courts.

To be distinguished is State v. Orethun, 84 Wis.2d 487, 267 N.W.2d 318 (1978), a decision upholding an OAR conviction despite the fact that a speeding conviction upon which the revocation was based had been reversed. In terms of the categories outlined here, the prior conviction only identified the defendant as a member of a class – those whose privileges could be revoked – and did not support guilt or enhance punishment.

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B. Priors used to identify members of a potentially dangerous class – collateral attack is not allowed

1. Contempt of court: punitive sanction – § 785.01

The Committee's conclusion is stated as follows in the Comment to Wis JI-Criminal 2031, Contempt of Court: Punitive Sanction: "It apparently is not appropriate to challenge the validity of the order in the context of the criminal prosecution based on failure to obey that order." The basis for this conclusion was a civil case holding that regardless of the legality of an order, a party is bound to comply with it until it is set aside through regular appeal channels. Getka v. Lader, 71 Wis.2d 237, 238 N.W.2d 87 (1976). Of course, the fact that there was a court order and that the defendant violated a provision of that order are elements of the crime.

2. Violation of injunction or restraining order – §§ 813.12, 813.122, 813.123, 813.125

"A defendant cannot collaterally attack the validity of a harassment injunction in a criminal prosecution for the violation of that injunction." State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992). See the discussion in the Comment to Wis JI-Criminal 2040, Violating a Temporary Restraining Order or an Injunction.

3. Felon in possession of a firearm – § 941.29

In Lewis v. United States, 445 U.S. 55 (1980), the United States Supreme Court held that a defendant charged under the federal counterpart to § 941.29 was not allowed to collaterally attack the prior conviction relied on to establish his felony status. The conclusion in Lewis was based on the distinction that the prior conviction in this situation was used in a way that focused "not on reliability, but on the mere fact of conviction. . . Enforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment.'" 445 U.S. 55, 57.

4. Escape – § 946.42

The Committee's conclusion is stated as follows in footnote 4, Wis JI-Criminal 1774, Jail or Prison Escape: "Although there apparently is no Wisconsin law on the subject, the Committee is of the opinion that the legality of the underlying conviction and sentence is not an issue where the charge is escape after conviction or sentence. Thus, it should be no defense that the defendant's underlying conviction is subject to challenge."

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V. Effect of a Successful Collateral Attack on the Original Conviction

One of the Committee's assumptions when SM-16 was originally drafted was that successful collateral attack affects only the use of the attacked prior conviction in the current proceeding. That is, the court in the current case has no authority to take any other action with respect to the prior; it remains as a valid conviction for all other purposes unless additional action is taken in the court that entered the conviction.

In State v. Deilke, 2004 WI 104, 274 Wis.2d 595, 682 N.W.2d 945, a defendant in a 2001 prosecution for 5th offense operating under the influence moved to collaterally attack prior convictions from 1993, 1994, and 2000 on the ground that they were obtained in violation of his right to counsel. The state conceded that the record did not show a valid waiver of counsel and the trial court granted Deilke's motion. The State then moved to reopen those priors, and the motion was granted in two of the three cases.[9] The Wisconsin Supreme Court held that Deilke's successful collateral attack violated a term of the plea agreements on which those convictions were based. This was a breach of the plea agreement, and the breach was material, because it deprived the state of a benefit for which it had bargained — using those convictions as predicates for higher penalties for future violations. So, the state could seek to reopen the convictions and, when successful, could reissue those original charges and try, or negotiate with, Deilke again. The court's decision did not address the basis for the court's authority to reopen those final judgments.[10]

Deilke involved unique facts in that all the prior convictions and the current prosecution were in the same county. The decision allows options for the prosecution that are beyond the scope of this Special Material. It does not affect the substance of the analysis provided here, which focuses on the validity of the prior convictions in a new prosecution.

COMMENT

SM-16 was originally published in 2000 and revised in 2001, 2003, 2005, and 2009. This revision was approved by the Committee in June 2019; it involved editorial changes and updating the text and comment.

1. When this SM was originally drafted, State v. Baker was one of the leading decisions relating to collateral attack. It was decided when OAR criminal penalties were determined by the number of prior OAR convictions. OAR penalties have changed several times since Baker was decided. Under the 2017-2018 Wisconsin Statutes, OAR is criminal only if the revocation is based on an OWI-related offense as set

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forth in § 343.307(2) or if death or great bodily harm is caused. The references to Baker in this SM were retained because the general rules it announced regarding collateral attack continue to apply.

2. For the right to counsel to apply, the prior offense must be a crime. For example, a refusal proceeding is a civil matter to which the right to counsel does not apply. State v. Krause, 2006 WI App 43, 289 Wis.2d 573, 712 N.W.2d 67.

3. Before Hahn, appellate decisions in Wisconsin allowed collateral attack based on at least two different defects in the prior prosecution:

(a) denial of the right to counsel; and,
(b) acceptance of a guilty plea that was not voluntarily and understandingly made.

In State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), the Wisconsin Supreme Court allowed collateral attack based on an allegation that the guilty plea in the prior case was not understandingly and voluntarily made. The court stated that collateral attack must be allowed whenever the alleged defect "undermines the reliability of the conviction." Baker relied on its interpretation of the decisions of the United States Supreme Court that had dealt with this issue – the primary one being Burgett v. Texas, 389 U.S. 109 (1967) which dealt with a challenge based on denial of counsel. Hahn limited Baker to the rule stated in Custis. 238 Wis 2d. 889, ¶17.

In State v. Foust, 214 Wis.2d 568, 570 N.W.2d 905 (Ct. App. 1997), the defendant was charged with operating under the influence as a third offense. The court of appeals held that the defendant could challenge the validity of one of the prior offenses in the new prosecution because he alleged that the earlier conviction was obtained as a result of a constitutionally defective plea colloquy. Though not referred to in Hahn, Foust is inconsistent with the Hahn decision and is implicitly overruled. [Also see State v. Dye, 215 Wis.2d 281, 572 N.W.2d 524 (Ct. App. 1997), suggesting that a collateral attack could be based on a contention that the earlier conviction was "constitutionally invalid because of an alleged Fourth Amendment violation: that it was the result of an illegal stop." 215 Wis.2d 281, 291. This possibility is clearly inconsistent with Hahn.].

4. In Hahn, court stated that it was providing a bright line rule and repeated its holding three times – compare paragraphs 4, 28, and 29 – in essentially the same words. The second-to-last sentence of paragraph 28 did not appear in the other two statements of the new rule. This sentence was revised in response to the state's motion for reconsideration in the decision reported at 2001 WI 6.

The Wisconsin Supreme Court applied Hahn in State v. Peters, 2001 WI 74, 244 Wis.2d 470, 628 N.W.2d 797. The court held that the defendant could collaterally attack his second conviction for operating after revocation [OAR] in a prosecution for a fifth offense OAR because the challenge was based on the denial of the right to counsel.

The defendant in Peters had focused his argument "on the Sixth Amendment and due process implications of conducting a plea and sentencing hearing by closed-circuit television from jail." 2001 WI 74, ¶18. Because the court found that the challenge was actually based on denial of the right to counsel, it could resolve the case by a straightforward application of Hahn:

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> Whether the defendant is entitled to mount this sort of constitutional challenge to a prior conviction collaterally rather than directly (or at all) depends upon an interpretation of the above-quoted language in Hahn, [referring to the decision on rehearing, 2001 WI 6, ¶2] and the influence, if any, of the Supreme Court's recent opinions in Daniels and Lackawanna County. We do not address this issue, however because the record reflects an arguable right-to-counsel violation, which is clearly established as an exception to the rule against collateral attacks on prior convictions. 2001 WI 74, ¶18.

[The United States Supreme Court cases referred to are Daniels v. United States, 532 U.S. 374, (2001) and Lackawanna County District Attorney's Office v. Coss, 532 U.S. 394, (2001). Their relevance to Wisconsin practice is unclear, because they discuss the collateral attack in the context of the procedural limits on a federal motion to vacate a sentence under 28 USC § 2255 (Daniels) and federal habeas corpus review of a state conviction under 28 USC § 2254.].

5. "We conclude that the Klessig colloquy requirement was and is a valid use of the court's superintending and administrative authority, . . . and that such a rule does not conflict in any way with the United States Supreme Court's decision in Tovar . . ." State v. Ernst, 2005 WI 107, ¶21, 283 Wis.2d 300, 699 N.W.2d 92. The reference is to Iowa v. Tovar, 541 U.S. 77 (2004), where the court held that a valid waiver of the Sixth Amendment right to counsel did not require specific advice from the court that waiver of counsel might result in a viable defense being overlooked and losing the opportunity for an independent opinion on whether pleading guilty is a wise choice.

In State v. Gracia, 2013 WI 15, 345 Wis.2d 488, 826 N.W.2d 87 the court rejected a collateral attack on a prior operating under the influence conviction: "despite a technically deficient plea colloquy, Gracia knowingly, intelligently, and voluntarily waived his right to counsel before he pleaded no contest to his second OWI in 1998 . . . He understood the difficulties and disadvantages of self-representation." ¶4.

6. To the extent that reconstructing the record relating to waiver of counsel appears to be necessary, see State v. DeFelippo, 2005 WI App 213, 287 Wis.2d 193, 704 N.W.2d 410. The decision outlines the standards for reconstructing the record where, on direct appeal, the defendant claimed absence of a voluntary waiver of counsel.

7. When this SM was originally drafted, State v. Baker was one of the leading decisions relating to collateral attack. It was decided when OAR criminal penalties were determined by the number of prior OAR convictions. OAR penalties have changed several times since Baker was decided. Under the 2017-2018 Wisconsin Statutes OAR is criminal only if the revocation is based on an OWI-related offense as set forth in § 343.307(2) or if death or great bodily harm is caused. The references to Baker in this SM were retained because the general rules it announced regarding collateral attack continue to apply.

8. The Committee believes that Tucker does not affect the general rule that allows considering other bad acts at sentencing even if they did not result in a criminal conviction. Tucker recognized that greater weight might be given to convictions believed to be valid and suggested the sentence might have been different if the trial judge had known that Tucker served 10 years on a conviction obtained in violation of the right to counsel.

9. State v. Deilke, 2004 WI 104, 274 Wis.2d 595, 682 N.W.2d 945, at footnote 4: "The State's motion regarding Deilke's 1993 and 2000 cases was granted by the circuit court for Eau Claire County, Judge Eric J. Wahl, presiding. The State's motion regarding Deilke's 1994 conviction was denied by a

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different judge in a different circuit court branch . . ." [Judge Wahl was the presiding judge in Deilke's new prosecution, in which he collaterally attacked the 1993, 1994, and 2000 convictions.].

10. The convictions affected were from 1993 and 2000. As to those convictions, Deilke had "served all of his time, paid all his fines, attended all required classes, endured his license revocations, and even forfeited his vehicle." 2004 WI 104, ¶51 [dissenting opinion of Justice Bradley].

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SM-18 DEFENDANT'S CONSENT TO PROCEED BY VIDEOCONFERENCE – WAIVER OF RIGHT TO BE PRESENT UNDER § 971.04

The following is intended for use when a defendant with counsel wishes to waive the statutory right to be present in the same courtroom as the presiding judge at a proceeding. See § 971.04 and State v. Soto, 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848. If the defendant is without counsel, it may be necessary to obtain or renew a waiver of counsel. See SM-30, Waiver and Forfeiture of Counsel.

1. The court should have the participants state their appearances and should identify where each participant is located.

2. The court should ascertain that the technology is working properly and ask questions like the following:[1]

   a. "Can you hear me?"

   b. "Can you see me?"

   c. "Do you understand that if at any time there is a problem with your ability to hear or see what is occurring in court today you are to immediately inform the court?"

   d. "Do you understand that if at any time you need to speak privately with your lawyer, you should inform the court and proper accommodations will be made?"

3. The court should identify for those appearing from a remote location any person in the courtroom who may not be visible to them. If the litigant or counsel wishes to physically see a particular individual, the court should accommodate that request if appropriate.

4. The court should engage in a colloquy with the defendant to ascertain whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing:[2]

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a. "Do you understand that you have the right to be physically present in the same courtroom[3] as the presiding judge during this proceeding?"

b. "Do you understand that you are not required to consent to having this proceeding conducted by videoconferencing?"

c. "Have you discussed this with your lawyer?"

d. "Has anyone made any promises or threats to you in connection with waiving your right to be present?"

e. "Do you wish to waive your right to be physically present in this courtroom at this proceeding?"

d. "Do you consent to conducting this proceeding by videoconferencing?"

5. The court should make a finding, on the record, that the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing.

COMMENT

SM-18 was approved by the Committee in February 2014.

This Special Material provides a model for an inquiry that is to be conducted when a defendant wishes to consent to having a court appearance conducted by video-conferencing. It applies where the defendant has the right to be present at a proceeding under § 971.04. The decision in State v. Soto, 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848, suggested that a colloquy be conducted in this situation.

See §§ 885.50 to 885.64, which address the "use of videoconferencing in the circuit courts." Section 885.60(2)(a) provides in part: "Except as may otherwise be provided by law, a defendant in a criminal case . . . is entitled to be physically present in the courtroom at all trials and sentencing or dispositional hearings." Soto held that the defendant's right to be physically present under § 885.60(2)(a) does not enlarge or diminish the statutory right under § 971.04. ¶31.

Section 971.04(1) provides that the defendant shall be present:

(a) At the arraignment;
(b) At trial;

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(c) During voir dire of the trial jury;
(d) At any evidentiary hearing;
(e) At any view by the jury;
(f) When the jury returns its verdict;
(g) At the pronouncement of judgment and the imposition of sentence;
(h) At any other proceeding when ordered by the court.

Plea hearings are not listed in § 971.04; however, if the defendant is found guilty at the conclusion of a plea hearing, it qualifies as "pronouncement of judgment" under sub. (1)(g).

When the defendant in Soto entered his guilty plea, he, defense counsel, and the DA were present in the courtroom in Trempealeau County. The judge participated via videoconference from Jackson County. A complete plea colloquy was conducted. The court held:

> ¶2 We conclude that Wis. Stat. § 971.04(1)(g) provides a criminal defendant the statutory right to be in the same courtroom as the presiding judge when a plea hearing is held, if the court accepts the plea and pronounces judgment. However, we also conclude that this statutory right may be waived and that Soto waived it prior to pleading and the court's pronouncement of judgment. We so conclude because Soto appeared in a courtroom in the Trempealeau County courthouse; both his attorney and the prosecuting attorney also appeared in the same courtroom; through videoconferencing, the judge was able to see, speak to and hear Soto and Soto was able to see, speak to and hear the circuit court judge; the judge explained that videoconferencing would be used for the plea hearing if Soto chose to enter a plea that day; and Soto expressly consented to the use of videoconferencing for the plea hearing. Accordingly, we affirm the circuit court's order denying Soto's motion to withdraw his guilty plea.

The court also described the type of inquiry that should accompany the use of videoconferencing for a hearing at which "presence" is required:

> ¶46 When videoconferencing is proposed for a plea hearing at which it is anticipated that judgment will be pronounced, the judge should enter into a colloquy with the defendant that explores the effectiveness of the videoconferencing then being employed. In that regard, the judge shall ascertain whether the defendant and his attorney, if represented by counsel, are able to see, speak to and hear the judge and that the judge can see, speak to and hear the defendant and counsel. The judge shall also ascertain, either by personal colloquy or by some other means, whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing. In so doing, questions should be asked to suggest to the defendant that he has the option of refusing to employ videoconferencing for a plea hearing at which judgment will be pronounced.

Note: Soto addressed the right to be present under § 971.04. The court did not address whether presence was required as a matter of due process, noting that Soto "abandoned his constitutional challenge in this court." ¶15, footnote 4.

This Special Material addresses waiver of the right to be present. However, the right may also be forfeited. State v. Vaughn, 2012 WI App 129, 344 Wis.2d 764, 823 N.W.2d 543, involved a defendant who, after being found competent to stand trial, was very difficult to deal with in the courtroom. The trial court warned him repeatedly, but ultimately had him removed from the courtroom. Trial proceeded with him

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absent and a jury found him guilty of attempted first degree intentional homicide. The court of appeals affirmed the conviction, finding that the record established that Vaughn forfeited his right to be present.

1. There are two aspects to the waiver inquiry: whether the technology is working properly and whether the defendant is waiving his or her right to present in the same courtroom as the judge. The questions in this section address the first aspect and are adopted from the "Video Conferencing Appearance Colloquy" distributed to trial judges.

2. The questions in this section address the second aspect of the waiver inquiry: whether the defendant is waiving his or her right to present in the same courtroom as the judge.

3. The Soto decision emphasized the importance of the courtroom setting:

> ¶23 We have required that the defendant be in a courtroom because the statute clearly speaks to the defendant's presence at the location of the proceeding. Requiring that the defendant be present in the courtroom is guided also by the belief that a courtroom is a setting epitomizing and guaranteeing "calmness and solemnity," see Cox v. Louisiana, 379 U.S. 536, 583 (1965) (Black, J., dissenting), so that a defendant may recognize that he has had access to the judicial process in a criminal proceeding. Finally, requiring the defendant to make his appearance in a courtroom avoids the potential or perceived problems that can occur when the defendant is located in another facility such as a jail, while the judge, prosecutor, and perhaps even defense counsel are in the courtroom. See generally Anne Bowen Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 Tul. L. Rev. 1089 (2004).
> 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848, ¶23.

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SM-20 VOIR DIRE

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Scope

The manner in which voir dire is conducted lies within the discretion of the court and varies greatly among judges. This special material begins with a suggested script that covers introductory and other general matters. Then it identifies the topics on which voir dire questions are statutorily required and suggests additional topics that are often covered. In both instances, the actual form of the question is left to the judge. The current framework for analyzing potential juror bias is outlined. The Comment attempts to collect relevant case law.

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I. Introduction

VOIR DIRE IS TO BE CONDUCTED IN OPEN COURT, ABSENT FORFEITURE OR WAIVER [1]

ASSURE THAT THE DEFENDANT AND DEFENSE COUNSEL ARE PRESENT.[2] AFTER THE CASE IS CALLED AND THE PANEL IS SWORN, PROCEED WITH THE FOLLOWING:

"All members of the jury panel, including those (back of the rail) (outside the jury box) should listen to all the questions that are directed to the panel until a jury of (12) (14) is selected."

"This is a criminal case, not a civil case, and I will read the allegations of the Information to you. An Information is nothing more than a written formal accusation against the defendant, charging the commission of one or more criminal acts. You are not to consider the Information as evidence against the defendant in any way. It does not raise any inference of guilt."

[READ OR SUMMARIZE THE INFORMATION.]

"The defendant (name) has entered a plea of not guilty to (the) (each) charge in the Information, which means the State must prove every element of the offense charged beyond a reasonable doubt."

[IDENTIFY THE PROSECUTOR, DEFENDANT, DEFENSE COUNSEL, AND ANY OTHERS AT COUNSEL TABLE. EACH PERSON SHOULD STAND WHEN INTRODUCED.]

"I will now ask you some general questions about your qualifications to sit as jurors in this case. Counsel should listen carefully to these general questions and not repeat them. Counsel may ask the jurors generally any proper questions and in addition ask proper questions of each juror as to matters specific to each juror."

"If your answer to any of my questions is 'yes,' raise your hand."

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II. Juror Qualifications And Required Questions[3]

A. Juror Qualifications – § 756.02

Section 756.02[4] sets out the basic qualifications for being a juror. Although these requirements are usually covered by juror qualification forms, judges may wish to review them at the beginning of voir dire by asking the panel whether anyone:

- is not a United States citizen;
- is not currently a resident of _____ County;
- is under the age of 18;
- is unable to understand English;[5] and,
- has been convicted of a felony and has not had his or her civil rights restored.

B. Required Questions – § 805.08(1)

Subsection 805.08(1) requires that questions on certain topics be asked by the judge. An affirmative answer to questions on either of the following topics requires that the juror be excused on the basis of "statutory bias":[6]

- whether any juror is related by blood or marriage to the defendant[7] or to any attorney; and
- whether any juror has any financial interest in the case.

Because case law requires excusing jurors who are related to a state witness,[8] an additional question should be asked in every case:

- whether any juror is related to any witness for the state.

Subsection 805.08(1) also requires questions on the following topics; an affirmative answer does not require excusing the juror but does require additional inquiry:[9]

- whether any juror has expressed or formed any opinion; and
- whether any juror is aware of any bias or prejudice in the case.

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C. Juror Qualification Forms; Supplemental Information; Case-Specific Questionnaires

There are several different forms containing juror information that are often referred to as "questionnaires." The Committee has concluded that there is value in using different terms to describe them because their functions are different.

1. Juror Qualification Forms – § 756.04(6)(am)

These are the forms sent out by the clerk when jurors are summoned for service. They cover the basic requirements for qualification for juror service. There is a standard form – Circuit Court Form GF-132 – available to judges through the clerk of court. Additional content varies by county.

2. Supplemental Information – § 756.04(6)(cm)

"The juror qualification form . . . may be supplemented to request other information that the court requires to manage the jury system in an efficient manner, including information that may be sought during voir dire examination." § 756.04(6)(cm)

3. Case-Specific Questionnaires

Additional questions may be submitted to potential jurors that relate to the specific case on which they might serve. Drafted by counsel, their use requires approval by the court and a cover letter explaining them. Their use is not feasible in counties where potential jurors are summoned without reference to a particular case.

Positive aspects to using questionnaires:

- they can be helpful in cases where there has been extensive pretrial publicity;
- where sensitive topics are involved, jurors may be more forthcoming than in open court;
- they can potentially save time in a case where extensive voir dire might be necessary on specific issues.

Negative aspects to using questionnaires:

- approving their use and content can take considerable court time;
- issues can be addressed more efficiently during voir dire.
- the questions may prompt jurors to try to research the case.

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4. Confidentiality – § 756.04(11)(a)

All juror information forms "shall remain confidential." They shall be used only for trial and appeal; counsel and parties may not retain copies. § 756.04(11)(a).

III. Voir Dire Of An Individual Juror Out Of The Presence Of The Jury Panel

The court's discretion over the form and number of questions extends to whether prospective jurors should be questioned collectively or individually out of the presence of the other prospective jurors. State v. Koch, 144 Wis.2d 838, 847, 426 N.W.2d 586 (1988). Factors relevant to deciding whether to conduct a sequestered voir dire are:

> (1) whether the circuit court conducted a thorough initial questioning of the panel members; (2) whether the panel members were reluctant to state whether they had a preconceived notion of the defendant's guilt or innocence; and (3) whether the circuit court imposed any restrictions upon the extent of defense counsel's questioning of the panel members on voir dire.

144 Wis.2d 838, 849, citing State v. Dean, 67 Wis.2d 513, 528, 227 N.W.2d 712 (1975). Other cases dealing with requests for individual or sequestered voir dire include State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (Ct. App. 1983); State v. Herrington, 41 Wis.2d 757, 165 N.W.2d 120 (1969).

Individual voir dire is most often used in cases involving sexual assault or significant pretrial publicity. While practice varies, an example of an explanation of the process and questions to the full panel in a sexual assault case follows. [If a different potentially sensitive crime or pretrial publicity is involved, the example must be modified.]

> Jurors, at this point the court is going to ask you some general questions. I ask that you raise your hand if "yes" would be your answer to any of these questions.
>
> In this case, the court is varying from its typical practice in that we will be conducting individual voir dire of persons depending on how these particular questions are answered. Listen carefully.
>
> Has any member of the panel or any member of their family, or any friends, relatives, or co-workers, been affected by unwanted sexual conduct, whether reported or not?
>
> [Note for the record the jurors – by name or number – who have raised their hands.]

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Referring to the entire panel again now, have you or any family member or close friend ever been investigated for, accused of, or charged with sexual assault?

[Note for the record the jurors – by name or number – who have raised their hands.]

[Add the following if the case has generated significant publicity.

Is there anyone among you who has read or heard anything about this case?]

[Note for the record the jurors – by name or number – who have raised their hands.]

At this point the court is going to conduct an individual voir dire of those persons who raised their hand in response to the questions. The process we will follow is that the prospective juror, the attorneys, the defendant, court personnel, and any members of the general public who wish to attend will go to [a jury room] [(designate other room)] where questions will be asked of the individual juror outside the presence of the other jurors.

This will take a few minutes. Please continue to be patient. The group of jurors whose names have been called must maintain their same seating order. While we are doing this you can stand up if you need to stretch or relax. If someone needs to use the restroom let the bailiff know and the bailiff will see that you are able to do that. But the group must maintain the same seating order that you are in.

The court, court reporter, clerk, security officer, the parties and their attorneys (and the alleged victim if requested) move to another room out of the presence of the rest of the panel. Those jurors who raised their hands are then invited in one at a time escorted by a bailiff. The court begins the questioning followed by questions by the prosecutor and the defense counsel. The court rules on whether or not a juror is to be excused. When everyone has returned to the courtroom the process may have to be repeated if additional jurors are called.

IV. Suggested Topics For Voir Dire Questions[10]

A. The Purpose Of Voir Dire

The Committee suggests that the court explain to the panel that the purpose of voir dire is to assure that persons chosen to serve will be fair and impartial jurors. An example follows.

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Impartiality

I would like to tell you what I mean by the term fair and impartial juror. I want you to all assume that you have heard all the evidence in this case, listened to my instructions on the law, deliberated with the other jurors, and you are thinking that the State has not proved this case beyond a reasonable doubt, you are thinking the defendant is not guilty. Is there anything in your background, your life experiences, your view of the criminal justice system, anything at all that makes you think that you would vote to find the defendant guilty anyway, even though the State had not proved him guilty?

The flip side of that question is equally important. You listened to all the evidence and my instructions and you are thinking he is guilty, the State has proved the case beyond a reasonable doubt. Is there anything in your background, life experiences, your view of the justice system that makes you feel that you would vote to find him not guilty even though the State has proved the case?

Or to put it a little more simply, are you going to decide this case based on anything other than what you hear from the witness stand and the rules of law that I instruct you on?

That is what I mean by being a fair and impartial juror. As you sit here right now without knowing much about this case, is there anyone who thinks, for any reason that they can not be a fair and impartial juror?

Bias

[It is obvious to everyone in the courtroom that Mr._____ is (African-American) with respect to his racial background.][11] I think we all walk around realizing we are different from everyone else. Those differences might be based on race, gender, ethnicity, body size, hair color or any number of factors, but when we let those kind of differences control how we judge someone or a situation we call that bias or prejudice or discrimination.

What is very important to me and everyone involved with this case is that we end up with 12 jurors who will decide this case on the evidence you hear from the witnesses and the rules of law I instruct you on and not on any of these kinds of difference.

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Now I realize what I am about to ask you is pretty difficult. I am asking you to tell me if you don't think you can be fair. That is pretty hard even in a one on one conversation let alone in front of a room full of strangers, but it is critically important. I am not going to argue with you or try to convince you to feel differently but I do need to know if you don't think you can be fair for this or any other reason.

Is there anyone who has concerns about or simply feels that they cannot be a fair juror in this case?

B. Topics For Questions

Questions on the following topics are often included in a judge's voir dire and are recommended for consideration in all cases. Other topics may be appropriate depending on the facts of the case.

1. Whether the estimated length of trial makes it impossible for anyone to serve.

2. Whether anyone has a physical or medical condition that makes it impossible to serve or makes it difficult to hear or understand the testimony.[12]

3. Whether there are any circumstances such as work schedule, medication, etc., that may make it difficult for a juror to pay attention or stay alert.[13]

4. Advise that it is alright to ask for a recess if a juror is having trouble staying alert.

5. Whether anyone knows any member of the defendant's family.

6. Whether anyone knows the defense attorney or the prosecutor or the judge.

7. Whether anyone knows the complaining witness or other witnesses who are expected to testify.

8. Whether anyone or a member of their immediate family is employed in a law enforcement capacity.[14]

9. Whether anyone would give more or less weight to the testimony of a police witness because that person is a police officer.

10. Whether anyone has heard or read anything about the case.

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11. Whether anyone has expectations about the conduct of the court and counsel, the nature of the evidence that will be presented, or the law that will be applied to this case based on descriptions of criminal investigations and trials from books, movies, television programs or the media.[15]

12. Whether anyone has previously served on a jury and, if so, whether that jury reached a verdict.[16]

13. Whether anyone has been the victim of a crime.[17]

14. Whether racial bias or prejudice may affect anyone.

15. Whether anyone has a religious or philosophical belief that prohibits them from sitting in judgment on another person.

16. If the case involves an interpreter, whether anyone speaks or understands the language involved.[18]

V. Dismissal For Cause; Following Up On Affirmative Answers[19]

If a panel member indicates that an answer to a question would be "yes," further inquiry is required. In any situation, the mere fact of an affirmative response is not enough to disqualify a person from jury service. The ultimate test is whether, the affirmative response notwithstanding, the juror can decide the case fairly and impartially on the evidence that is presented in court.[20]

In a group of four cases decided on the same day, the Wisconsin Supreme Court identified and implemented a new set of three terms for classifying juror bias.[21] State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), was the lead decision. It held that the usefulness of the old terms for types of juror bias had "run full course" and that the terms "implied bias," "actual bias," and "inferred bias" should no longer be used. In their place, the following are adopted: statutory bias, subjective bias, and objective bias.

A. Statutory bias

"Statutory bias" refers to prospective jurors who are excluded from jury service under § 805.08(1):

- those related by blood or marriage to any party;
- those related by blood or marriage to any attorney appearing in the case; and
- those who have a financial interest in the case.

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A person meeting one of these descriptions may not serve regardless of his or her ability to be impartial.

A prospective juror who is the brother-in-law of a state witness must be struck for cause on the basis of statutory bias. State v. Czarnecki, 231 Wis.2d 1, 604 N.W.2d 891 (Ct. App. 1999).[22]

Note: § 805.08(1) also refers to those who have expressed or formed an opinion or are aware of any bias or prejudice in the case; they are not considered to fall into the "statutory bias" class but are more accurately described as those for whom evidence of "subjective bias" exists. Faucher, supra, 227 Wis.2d 700, 717. Thus, an individual inquiry is required before they are to be dismissed.

In addition to those jurors falling within the "statutory bias" category, one other class of jurors must always be excused: jurors who are related to a state witness.[23] With these exceptions, it is improper to exclude any class of jurors without individual inquiry into ability fairly to decide the case.[24]

B. Subjective bias

"Subjective bias" refers to a prospective juror who has opinions or feelings about the case that the juror is unable or unwilling to set aside. It refers to the juror's actual state of mind and is usually revealed by a prospective juror during voir dire. Faucher, supra, 227 Wis.2d 700, 719; State v. T. Oswald, 2000 WI App 2, ¶19, 232 Wis.2d 62, 606 N.W.2d 207.[25]

The inquiry into subjective bias involves determining whether the prospective juror has expressed or indicated an opinion or a bias and, if so, whether the juror has the willingness and ability to set those feelings aside and consider the case on the evidence presented in court. As to the latter issue, courts should seek to elicit a clear expression of impartiality by asking a question like the following:

> Are you able to put your feelings or opinions aside and decide this case based solely on the evidence presented and the law as the court defines it for you?

However, "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." State v. Erickson, 227 Wis.2d 758, 776, 596 N.W.2d 749 (1999). "Magical words" are not required. State v. Jimmie R.R., 2000 WI APP 5, ¶28, 232 Wis.2d 138, 606 N.W.2d 196. Also see State v. Ferron, 219 Wis.2d 481, 579 N.W.2d 654

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(1998), where a prospective juror's statement that he could "probably" set his feelings aside was not considered to be a strong enough statement.[26]

In State v. Carter, 2002 WI App 55, 250 Wis.2d 851, 641 N.W.2d 517, the court found that subjective bias was established as a matter of law where a prospective juror clearly stated that his own experience with a sexual assault in his family would influence his ability to be fair and impartial and where no follow-up questions qualified that statement. The trial court's finding that no subjective bias was shown was clearly erroneous and defense counsel provided ineffective assistance by failing to question the juror's statement or move to strike the juror. 2002 WI App 55, ¶¶13, 15.

Appellate courts reviewing these cases will look carefully at the answers to voir dire questions but evaluating the juror's sincerity also depends on the juror's conduct, demeanor, and nonverbal cues. Jimmie R.R., supra, 232 Wis.2d 138, ¶29. Thus, substantial deference will be accorded to the trial judge who can observe these qualities. The value of reliance on answers to voir dire questions is further reduced because lawyers ask leading questions and intentionally elicit contradictory answers, Jimmie R.R., supra 232 Wis.2d 138, ¶30, and sometimes present confusing and ambiguous questions. State v. Gilliam, 2000 WI App 152, ¶¶12-14, 238 Wis.2d 1, 615 N.W.2d 1.

C. Objective bias

Objective bias refers to a prospective juror whose opinions or feelings are such that a reasonable person in the juror's position could not set them aside. Objective bias may involve a direct, critical, personal connection between the individual juror and crucial evidence or a dispositive issue in the case or an intractable negative attitude toward the justice system in general. State v. J. Oswald, 2000 WI App 3 ¶8, 232 Wis.2d 103, 606 N.W.2d 238.[27]

In State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), a prospective juror had a strong opinion about the credibility of a crucial state's witness. The supreme court found that objective bias was established because the juror "could not truly set aside his strongly held belief that [the witness] would not lie" despite his apparently sincere intentions to do so. 227 Wis.2d 700, 733.[28]

In State v. Lindell, 2001 WI 108, ¶4, 245 Wis.2d 689, 629 NW.2d 223, the court held that objective juror bias was established as a matter of law where the juror knew the homicide victim as a friend of the family and business associate.

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In State v.Erickson, 227 Wis.2d 758, 776, 596 N.W.2d 749 (1999), a juror in a sexual assault case had been a victim of sexual abuse as a child. But the supreme court found that objective bias was not established because the juror's connection was remote.

Objective bias may also be established if the prospective juror has a direct connection to a dispositive issue in the case, such as the defense theory, coupled with a personal belief regarding the outcome of that issue. In State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999), the supreme court held that "veteran jurors" who had rejected a breathalyzer defense in a preceding case should have been dismissed from service in a second drunk driving case involving the same defense. Veteran jurors are not to be dismissed solely on the basis of their having served as jurors in a similar case, but "these veteran jurors did exhibit bias in that reasonable jurors in their position could not set aside expressed opinions and prior knowledge relating to the veracity of breathalyzer results." 227 Wis.2d 736, 751.

A third situation where objective bias may be present is where jurors demonstrate an intractable or ingrained negative attitude towards the justice system. In State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999), the supreme court held that prospective jurors with negative experience with the justice system cannot be automatically excluded but must be excluded if their experience is recent and left them with negative feelings.

The Mendoza decision advised that trial courts should err on the side of caution when considering a request to remove a juror for cause, especially where objective bias is concerned:

> The circuit courts are . . . advised to err on the side of striking prospective jurors who appear to be biased, even if appellate courts would not reverse their determinations of impartiality. Such action will avoid the appearance of bias, and may save judicial time and resources in the long run.

Mendoza, supra, at 868 (quoting State v. Ferron, 219 Wis.2d 481, 503, 579 N.W.2d 654 (1998). This admonition was repeated in State v. Lindell, supra, ¶49. Also see State v. J. Oswald, 2000 WI App 3 ¶¶52-53, 232 Wis.2d 103, 606 N.W.2d 238, J. Nettesheim, concurring.

A different aspect of objective bias was considered in State v. Neumann, 2013 WI 58, 348 Wis.2d 455, 832 N.W.2d 560, a case involving extensive pretrial publicity. Both parents of an 11-year-old were convicted of 2nd degree reckless homicide under § 940.06 after the girl died from diabetic ketoacidosis resulting from untreated juvenile onset diabetes. The wife was tried first and convicted. The jury in trial of the father was told of the result of the mother's trial. The court stated: "We recognize that evidence of a co-defendant's guilt, under

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some circumstances, can be prejudicial to the defendant on trial, and in cases in other jurisdictions, convictions have been overturned on this ground. . . . Nevertheless, circumstances in the present case justified informing the jury about the mother's status." 2103 WI 58, ¶¶158, 159.

In State v. Tody, 2009 WI 31, 316 Wis.2d 689, 764 N.W.2d 737, all six members of the court who participated agreed that it was error for the trial judge to fail to strike the judge's mother from the jury panel. Three justices concluded that the circumstances showed "objective bias."[29] Three justices concluded that the judge's error was in not removing the juror or recusing himself under the trial court's inherent authority to administer justice.

In State v. Sellhausen, 2012 WI 5, 338 Wis.2d 243, 808 N.W.2d 390, the issue was whether a new trial was required where the trial judge failed to disqualify his daughter-in-law from sitting on the jury. All members of the court apparently agreed that a new trial was not required because the defense removed the juror by using a peremptory challenge and received a fair trial from an impartial jury. Justice Ziegler concurred, adopting her concurring opinion in the Tody case. Three justices joined her, meaning that the concurring opinion in Tody is now the law on this issue.

D. Remedy

The erroneous failure to excuse a juror for cause does not require retrial where the defense used a peremptory challenge to strike that juror, resulting in an impartial jury. State v. Lindell, 2001 WI 108, ¶5, 245 Wis.2d 689, 629 NW.2d 223. Lindell overruled State v. Ramos, 211 Wis.2d 12, 564 N.W.2d 328 (1997), which had required an automatic reversal when a defendant used a peremptory strike to remove a prospective juror who should have been excused for cause.[30]

VI. Peremptory Challenges

A. Number – § 972.03

In a felony case, both the state and the defendant receive 4 peremptory challenges. The number increases to 6 if the crime is punishable by life imprisonment.[31] An additional peremptory challenge is to be allowed each side if additional jurors [commonly referred to as "alternate jurors"] are selected under § 972.04(1), bringing the total to 7. The number for the defense also increases if there are multiple defendants.[32] Trial courts lack authority to allow correction of an allegedly mistaken exercise of a peremptory challenge once the jury is impaneled.[33]

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B. Claim that a challenge is race- or gender-based

Peremptory challenges may not be used to exclude a prospective juror on the basis of the juror's race.[34] This rule applies even though the members of a jury panel are of a different race than the defendant.[35] The same rule applies to the exercise of peremptory challenges based on the juror's gender.[36]

In order to constitute a class for these purposes, "the group must be objectively identifiable from the rest of the community, be large enough that the general community recognizes it as an identifiable group, and its members share ethnic and cultural traditions and customs, and, perhaps most important, share discrimination because of their identity and 'differentness.'" State v. Guerra-Reyna, 201 Wis.2d 751, 756, 549 N.W.2d 779 (Ct. App. 1996). Mexican-Americans are a class entitled to equal protection of the law in connection with jury service. Id.

A claim that a peremptory challenge was improperly based on race or gender must be raised by motion before the jury is sworn or it will be considered waived.[37] Upon the defendant's timely motion, a three-step process is used to evaluate the claim:[38]

- there must be a prima facie showing that the peremptory challenge was based on race or gender;[39]
- the burden shifts to the opposing party to articulate a race- or gender-neutral explanation for striking the juror;[40] and
- the court must determine whether the objecting party has carried the burden of proving purposeful discrimination.

VII. Concluding Questions

At the end of the court-conducted voir dire, many judges review one or more of the important jury instructions with the jury. An example follows.

> If you are selected as a juror, following the completion of all of the testimony and the arguments of counsel, I will instruct you on the principles of law that will govern you in your consideration of the evidence, weighing the testimony, and reaching your verdict. One of the instructions is on burden of proof and presumption of innocence. It reads as follows:
>
> [READ WIS JI-CRIMINAL 140]
>
> Is there anyone who believes that he or she could not follow that instruction?"

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Another instruction relates to the credibility of witnesses. It reads as follows:"

[READ WIS JI-CRIMINAL 300]

Is there anyone who believes that he or she could not follow that instruction?"

VIII. Instruction After Jury is Selected[41]

HERE INSERT PRELIMINARY INSTRUCTIONS IF DESIRED. SEE, FOR EXAMPLE, WIS JI-CRIMINAL 50.

IX. Anonymous And "Numbers" Juries

Whenever a court restricts any juror information, including referring to a juror by number instead of by name, the court must make an individualized determination that the restriction of information is necessary and must take reasonable precautions to minimize any prejudicial effect to the defendant.

In State v. Britt, 203 Wis.2d 25, 553 N.W.2d 528 (Ct. App. 1996), the trial court had ruled that the jurors' names, addresses, and places of employment could not be publicly revealed in open court or on the record; however, both parties had access to all juror information via written questionnaires. This was considered to be an "anonymous jury" and its use upheld by the court of appeals because there was a strong reason to believe that the jury needed protection and reasonable precautions were taken to minimize any prejudicial effect to the defendant.

In State v. Tucker, 2003 WI 12, 259 Wis.2d 484, 657 N.W.2d 374, the trial court used only numbers to refer to the jurors, although both parties had access to all juror information, including the jurors' names. The Wisconsin Supreme Court held that this practice, termed a "numbers jury," was subject to the same requirements as those that apply to an anonymous jury[42] and found that the trial court erred in two respects. First, the trial court did not make an individualized determination that the jurors needed protection based on the specific circumstances of the case. Second, the trial court did not take adequate precautions to minimize any prejudicial effect.

A. Individualized Determination

Before a trial court restricts any juror information, the court must make an individualized determination that the facts and circumstances of the case require that the jury be protected. Among the factors that may be taken into account:

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(1) the defendant's involvement in organized crime;
(2) the defendant's participation in a group with the capacity to harm jurors;
(3) the defendant's past attempts to interfere with the judicial process; and
(4) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

State v. Tucker, 2003 WI 12, ¶22 [citing United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995); United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994).]

B. Precautionary Statement

When juror information is restricted, there is a danger that the jurors will interpret the special measures as reflecting on the defendant's guilt or character. The general instruction on the presumption of innocence is not sufficient to address this issue. Therefore, "the circuit court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead of names should in no way be interpreted as a reflection of the defendant's guilt or innocence. . . A precautionary statement must not mislead a jury, but must be based on factors and influences that are relevant in a particular case." State v. Tucker, 2003 WI 12, ¶23, ¶24.[43]

While it may be necessary to tailor the precautionary statement for the facts of a particular case, the Committee offers the following as a general model:[44]

> I have decided that for the convenience of court and counsel, we will refer to jurors by numbers. This should not influence your verdict in any manner.

COMMENT

Wis JI-Criminal SM-20 was originally published in 1966 and revised in 1991, 2000, 2003, 2004, and 2010. This revision was approved by the Committee in August 2017.

"Control of the voir dire examination rests primarily with the trial court. . . . The trial court has broad discretion as to the form and number of questions to be asked. The exercise of this discretion and the court's restriction upon inquiries, however, are subject to 'the essential demands of fairness.'" (Citation omitted.) Hammill v. State, 89 Wis.2d 404, 408, 278 N.W.2d 821 (1979).

General standards set forth by the Wisconsin Supreme Court in a 1962 decision strike the Committee as appropriate today:

> We approve the procedure followed by the trial court in conducting the voir dire examination. This procedure is for the court to propound the questions quite generally asked of jurors in most jury

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trials. Under this procedure, counsel are confined to later propounding only those questions to individual jurors which cover matters not included in the questions put by the court. We deem that this greatly shortens the time required in picking a jury over that required where the court leaves the questioning entirely to counsel, but at the same time adequately protects the interests of the parties. We especially commend the step here followed of holding a preliminary conference between the court and counsel, without the hearing of the jury, for the purpose of permitting counsel to request that particular questions be propounded to the jury and permitting opposing counsel to enter objections thereto. If any requested questions are denied, or if objections are entered to questions the court proposes to ask the panel, the reporter should record the same as was done here.

Filipiak v. Plombon, 15 Wis.2d 484, 496, 113 N.W.2d 365 (1962).

Subsection 805.08(1) provides in part that questions by the parties "shall not be . . . based on hypothetical questions." (The complete statute is quoted in note 3, below.)

1. Closing voir dire to the press and public is justified only when there is a compelling need to protect the defendant's right to a fair trial. A hearing must be conducted and specific findings must be made before a closure order is entered. State ex rel. LaCrosse Tribune v. Circuit Court, 115 Wis.2d 220, 340 N.W.2d 460 (1983). Also see State ex rel. Storer v. Gorenstein, 131 Wis.2d 342, 388 N.W.2d 633 (Ct. App. 1986); Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

In two cases from the same county, the same trial judge excluded the public from voir dire, primarily because the courtroom was too small to accommodate the large jury panels and members of the public. Neither defendant objected, and the rest of the trial was open. In State v. Pinno and State v. Seaton, 2014 WI 74, 356 Wis.2d 106, 850 N.W.2d 207, the Wisconsin Supreme Court reached the following conclusions:

¶6 First, the Sixth Amendment right to a public trial extends to voir dire. Presley v. Georgia, 558 U.S. 209, 213 (2010). A judge's decision to "close" or limit public access to a courtroom in a criminal case requires the court to go through an analysis on the record in which the court considers overriding interests and reasonable alternatives as set out in Waller v. Georgia, 467 U.S. 39, 45, 48 (1984). The court must make specific findings on the record to support the exclusion of the public and must narrowly tailor the closure. Id.

¶7 Second, the Sixth Amendment right to a public trial may be asserted by the defendant at any time during a trial. A defendant who fails to object to a judicial decision to close the courtroom forfeits the right to a public trial, so long as the defendant is aware that the judge has excluded the public from the courtroom. . . .

¶8 Third, the records in these cases are clear that neither Seaton nor Pinno objected to the alleged courtroom closure. . . . Therefore, Seaton and Pinno both forfeited their rights to a public trial.

Note: There is an extensive discussion of the obligations of the trial judge with respect to closing the courtroom – see ¶¶69 - 80.

2. The defendant has a right to be present at voir dire under § 971.04(1)(c) and the state and federal constitutions; further, this right may not be waived. State v. Harris, 229 Wis.2d 832, 839, 601 N.W.2d 682

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(Ct. App. 1999). The right to be present includes voir dire conducted in camera. State v. David J.K., 190 Wis.2d 726, 528 N.W.2d 434 (Ct. App. 1994). The exclusion of the defendant from the in camera interview of three jurors was found to be harmless error in State v. Tulley, 2001 WI App 236, 248 Wis.2d 505, 635 N.W.2d 807. However, in extreme cases, a defendant may forfeit the right to be present by engaging in disruptive behavior. Trial courts are afforded considerable discretion in dealing with these difficult situations. See, for example, State v. Haste, 175 Wis.2d 1, 500 N.W.2d 678 (Ct. App. 1993); Illinois v. Allen, 397 U.S. 337 (1970). (Also see SM-30, WAIVER AND FORFEITURE OF COUNSEL . . .)

In State v. Gribble, 2001 WI App 227, 248 Wis.2d 409, 636 N.W.2d 488, the court held that it was not error for the trial court to conduct inquiries of prospective jurors regarding possible undue hardship resulting from jury service outside the presence of the defendant and defense counsel. Questioning about possible excuse from or deferral of jury service under § 756.03 is not part of the "voir dire" within the meaning of § 971.04(1)(c). 2001 WI App 227, ¶18. However, caution should be exercised in engaging in any conversation with jurors off the record. See State v. Harris, supra.

In State v. Alexander, 2013 WI 70, 349 Wis.2d 327, 833 N.W.2d 126, the defendant was tried before a jury on a charge of 1st degree intentional homicide. During the trial, two jurors approached the bailiff to state that one juror knew a woman in the gallery and the other that he knew one of the defense witnesses. The judge held separate in-chambers discussions with each juror; the prosecutor and defense counsel were present; the defendant was not. The judge dismissed both jurors. The defendant appealed on the ground that he had a right to be present at the in-chambers discussions. The Wisconsin Supreme Court recognized that the defendant had a constitutional right to be present at his trial, but "[w]hether this right to be present at trial encompasses in-chambers meetings "admits of no categorical 'yes' or 'no' answer. A conference in chambers might well constitute part of the trial depending upon what matters are discussed or passed upon. Likewise, such a conference might not be a part of the trial in the sense of one's constitutional right to be present. . . The test for whether a defendant's presence is required at an in-chambers hearing, or at a conference in the courtroom after the judge has emptied it of spectators, is whether his absence would deny him a fair and just hearing." ¶1 The court concluded that Alexander's constitutional and statutory rights to be present were not violated.

3. The statutory framework relating to the selection of jurors and voir dire is provided by §§ 972.01 and 805.08. Section 972.01 provides that civil rules apply:

> The summoning of jurors, the selection and qualifications of the jury, the challenge of jurors for cause and the duty of the court in charging the jury and giving instructions and discharging the jury when unable to agree shall be the same in criminal as in civil actions, except that s. 805.08(3) shall not apply.

(The excepted section, § 805.08(3), relates to the number of peremptory challenges, which is covered by § 972.03 for criminal cases.) Sections 756.001 through 756.03 address the qualifications of jurors and excuses from and deferrals of jury service. The standards for examination of jurors in civil cases are set forth in § 805.08(1):

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section

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shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

4. "**756.02 Juror qualifications.** Every resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen and able to understand the English language is qualified to serve as a juror in that circuit unless that resident has been convicted of a felony and has not had his or her civil rights restored."

5. Persons who are not "able to read and understand the English language" are not qualified for jury service; the clerk shall strike their names from the list of prospective jurors. §§ 756.02 and 756.04(9). State v. Carlson, 2003 WI 40, ¶2, 261 Wis.2d 97, 661 N.W.2d 51.

6. State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), adopted the term "statutory bias" to identify those excluded from jury service under § 805.08(1): those related by blood or marriage to any party or to any attorney appearing in the case and those who have a financial interest in the case. A person meeting one of these descriptions may not serve regardless of his or her ability to be impartial. Those who are to be excluded for "subjective bias" or "objective bias" can be identified only after a more complete inquiry. See the text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

7. Marriage does not cause the blood relatives of one spouse to become related to the blood relatives of the other spouse. Thus, it was not error to refuse to disqualify a juror whose second cousin was married to the victim's sister. State v. Noren, 125 Wis.2d 204, 211, 371 N.W.2d 381 (Ct. App. 1985).

8. "[P]rospective jurors who are related to a state witness by blood or marriage to the third degree as shown in Figure 852.03(2), Stats., must be struck from the jury on the basis of implied bias." State v. Gesch, 167 Wis.2d 660, 662, 482 N.W.2d 99 (1992). [Note: The degree of kinship table formerly found in § 852.03(2) was recreated as § 990.001(16) by 1999 Wisconsin Act 32.] Under the current juror bias jurisprudence, Gesch is apparently to be treated as a unique case where "objective bias" will always be present. State v. Faucher, 227 Wis.2d 700, 724, 596 N.W.2d 770 (1999). See the text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

A prospective juror who is the brother-in-law of a state witness must be struck for cause on the basis of statutory bias. State v. Czarnecki, 231 Wis.2d 1, 604 N.W.2d 891 (Ct. App. 1999).

9. Faucher, note 6, supra, concluded that jurors who are covered by the second set of statutorily-required questions — those who have expressed or formed an opinion and those who are aware of any bias or prejudice in the case — are not in the "statutory bias" class who must always be excluded. Rather, their affirmative answer is evidence of "subjective bias" or "objective bias" which requires further inquiry into their ability to be fair and impartial. See text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

10. The Committee does not believe that the order in which the questions are presented makes any difference, and it is expected that judges will develop a sequence that seems to them to be the most logical and convenient.

11. If the defendant's difference is not obvious, start with the second sentence.

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12. A trial court's finding that a juror's physical limitations caused by a medical condition did not prevent him from sitting as a juror was affirmed in State v. Guzman, 2001 WI App 54, 241 Wis.2d 310, 624 N.W.2d 717. The constitutional right to an impartial jury requires that a defendant not be tried by a juror who cannot comprehend testimony. This right was violated where two hearing-impaired jurors did not hear some of the testimony of two child witnesses. State v. Turner, 186 Wis.2d 277, 521 N.W.2d 148 (Ct. App. 1999).

13. Asking questions like this may help to avoid problems with claims relating to alleged "sleeping jurors" that have reached the appellate courts. See, for example, State v. Novy, 2013 WI 23, 346 Wis.2d 289, 827 N.W.2d 610 and State v. Saunders, 2011 WI App 156, 338 Wis.2d 160, 807 N.W.2d 679.

14. Law enforcement officers are not per se ineligible to serve as jurors. "Absent actual proof to the contrary elicited during voir dire, there is simply no basis for concluding that law enforcement officers would not act in accordance with their sworn duty and decide a case impartially. . . ." State v. Louis, 156 Wis.2d 470, 483, 457 N.W.2d 484 (1990). Whether any individual officer should be removed for cause lies within the trial court's discretion. 156 Wis.2d 470, 479. Knowing a police officer involved in the case is not cause for dismissal if the persons say it will not impair their ability fairly to determine the evidence. State v. Zurfluh, 134 Wis.2d 436, 438, 397 N.W.2d 154 (Ct. App. 1986). ¶3

In State v. Smith, 2006 WI 74, 291 Wis.2d 569, 716 N.W.2d 482 , the Wisconsin Supreme Court held that it was not error (in a Milwaukee criminal prosecution) to refuse to strike for cause a juror who worked in the Milwaukee County DA's office in Children's Court: ". . . [T]he circuit court reasonably concluded that [the juror] was not objectively biased under the facts and circumstances as a reasonable person in [the juror's] position could be impartial. . . . Essentially, we decline to create a per se rule that excludes potential jurors for the sole reason that they are employed by the Milwaukee County District Attorney's Office."

15. This topic was added by the Committee in response to suggestions that the so-called CSI effect be addressed. This refers to unrealistic expectations about investigative practices that jurors may have as a result of watching television shows, movies, etc. The Committee believes it is important to state the inquiry broadly enough to include expectations relating to the law and how judges and lawyers act as well as to include expectations created by books and media reports.

16. So-called veteran jurors should not be categorically excluded, even where issues in a subsequent trial are nearly identical to the initial trial. Rather, there should be an individualized analysis of each juror to determine if there is "subjective bias" or "objective bias." State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999). In Kiernan, the court applied the "objective bias" test to "veteran jurors" who, sitting in a previous case, had rejected the same breathalyzer defense that Kiernan used. The court held that the veteran jurors showed "objective bias" — reasonable jurors in their position could not set aside their opinions and prior knowledge about the accuracy of breathalyzer results.

Also see State v. Loukata, 180 Wis.2d 191, 196, 580 N.W.2d 896 (Ct. App. 1993): while "jurors who had acquitted a defendant in an unrelated case were improperly excused from the panel from which Loukata's jury panel was drawn," the defendant's right to a jury selected from a fair cross section of the community was not violated.

17. In State v. Delgado, 223 Wis.2d 270, 588 N.W.2d 1 (1999), the court reversed a conviction and ordered a new trial where a juror failed to disclose, in response to a voir dire question, that she had been the victim of a sexual assault when she was a child. The court found that the trial court's finding of no "inferred

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bias" was clearly erroneous. Under the court's juror bias jurisprudence, this type of case is to be analyzed under the test for "objective bias." State v. Faucher, 227 Wis.2d 700, 726-27, 596 N.W.2d 770 (1999).

Also see State v. Olson, 179 Wis.2d 715, 508 N.W.2d 616 (Ct. App. 1993), involving the same situation as that presented in Delgado.

In State v. Funk, 2011 WI 62, 335 Wis.2d 369, 799 N.W.2d 421, the defendant was convicted by a jury of two counts of sexual assault of a child. After trial, it was discovered that one of the jurors, Tanya G., had been the victim of multiple sexual assaults by a school bus driver when she was 10 and the victim of a forcible sexual assault when she was 17. Specific questions about jurors' possible history as victims were not asked during voir dire, but closely related questions were. The trial court held a postconviction hearing and concluded that Tanya G. was subjectively biased and objectively biased and ordered a new trial. The court of appeals affirmed and the supreme court reversed, summarizing its holding as follows:

> ¶2 We conclude that Tanya G. failed to respond to a material question during voir dire when Funk's attorney asked if anyone on the jury panel had previously testified in a criminal case. We also conclude that the circuit court's finding that Tanya G. was subjectively biased against Funk is unsupported by facts of record and is clearly erroneous. Finally, we conclude that the facts necessary to ground a circuit court's reasonable legal conclusion that a reasonable person in Tanya G.'s position could not be impartial were not developed in this case, and therefore the circuit court's conclusion that Tanya G. was objectively biased was erroneous. Accordingly, we reverse the court of appeals order and reinstate the guilty verdict and judgment of conviction.

Three justices dissented, concluding that the trial court's decision deserved greater deference and that it was supported by a reasonable interpretation of the facts.

18. See Wis JI-Criminal 60 for a suggested instruction advising jurors that they must rely on the evidence as presented through the official court interpreter. It may be advisable to obtain a juror's commitment to do so during voir dire.

19. Objection to a juror's bias is waived if no motion is made to remove the juror for cause. State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987). Defense counsel's "failure to so move is a waiver of the defendant's right to object to that person sitting on the jury. There need be no statement on the record by the defendant that he consents to each juror that is sworn in." State v. Brunette, 220 Wis.2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998).

20. Whether jurors' answers were sufficient to "rehabilitate" them was discussed in State v. Lepsch, 2017 WI 27, 374 Wis.2d 98, 892 N.W.2d 682.

21. State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999) was the lead decision. It concluded that a juror who had a strong opinion that a key witness was credible should have been dismissed for "objective bias." State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999), concluded that "veteran jurors" should not be categorically excused but that the jurors in the case showed "objective bias" because they had strong opinions about the reliability of breathalyzer test results, which was the focus of the defense in the case. State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999), reached a similar conclusion with regard to jurors with criminal records — they should not be categorically excused but may show "objective bias"

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when their criminal justice experience is recent and resulted in strong negative feelings about the system. In the fourth case, State v. Erickson, 227 Wis.2d 758, 596 N.W.2d 749 (1999), the court concluded that a juror's experience 40 years earlier as a victim of sexual assault did not show either subjective or objective bias.

The Faucher decision also reviewed seven previously-decided juror bias cases and classified them under the new terminology. 227 Wis.2d. 700, 721-30.

22. Czarnecki relied on State v. Gesch, see note 8, supra, which had held that a juror who was the brother of the state's police witness should be excluded on the basis of "objective bias."

23. See State v. Gesch, discussed in note 8, supra. Faucher characterized Gesch as a "unique" case apparently to be treated as one of "objective bias." 227 Wis.2d 700, 724.

24. State v. Louis, 156 Wis.2d 470, 457 N.W.2d 484 (1990): police officers; State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999): veteran jurors; State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999): jurors with a criminal record; and State v. Chosa, 198 Wis.2d 392, 321 N.W.2d 280 (1982): Native Americans in a case where the defendant was a Native American.

25. Subjective bias was not present where a self-employed juror said he did not want to serve, because his income would suffer and that he thought this would affect his ability to fair. "Inconvenience and inability to work during regular working hours should not, and cannot, be transferred into bias sufficient to strike a juror for cause." State v. Guzman, 2001 WI App 54, ¶17, 241 Wis.2d 310, 624 N.W.2d 717.

26. But see State v. Czarnecki, 2000 WI App 155, 237 Wis.2d 794, 615 N.W.2d 672, where subjective bias was not found to be established, despite the juror's statements that he believed police officers were generally more credible than other witnesses and that he could "probably" put that belief aside.

27. But see Oswald v. Bertrand, 374 F.3d 475 (7th Cir. 2004), where the U.S. Court of Appeals for the 7th Circuit granted relief, concluding that there was inadequate inquiry of the extent to which extensive publicity affected the jury panel's ability to be impartial. The decision emphasized the trial court's duty to undertake a diligent inquiry where there is a high probability of jury bias. Decisions of "lower federal courts" are not binding on courts in Wisconsin. State v. Lepsch, 2017 WI 27, 374 Wis.2d 98, 892 N.W.2d 682, ¶35, footnote 14.

28. But see State v. Czarnecki, 2000 WI App 155, 237 Wis.2d 794, 615 N.W.2d 672, where Faucher was distinguished on the grounds that the juror did not have a strong opinion about the credibility of the police officer witness.

29. In Tody, three justices noted three bases contributing to "objective bias": "the judge's mother has an interest in the case, namely her familial relationship with the judge, that is extraneous to the evidence on which the jury is to base its decision"; "the mother's presence may have a potential impact on the trial proceedings or the jury's deliberations"; and, "the presence of a member of the judge's immediate family on the jury seems conspicuously inconsistent with the jury's function as, in part, a check upon the power of the judge." 2009 WI 31, ¶¶38-40. Three justices concluded that "it was counterproductive to pigeonhole this case into the category of objective bias," 2009 WI 31, ¶66, but agreed that the judge erred in presiding over the case with his mother on the jury panel. They referred to SCR 60.04(4)(e) which requires a judge to recuse himself or herself when "a person within the third degree of kinship" to the judge is a party, a lawyer,

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has more than a de minimis interest that could be substantially affected by the proceeding or is likely to be a material witness. The rule does not specifically list being a juror as a ground for recusal, but may offer some guidance as to the nature of the relationships that might raise the issue presented in Tody.

30. The automatic reversal rule of Ramos was not required under the federal constitution. In United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000), the Court held that if a defendant elects to cure a trial court's erroneous refusal to excuse a juror for cause by exercising a peremptory challenge, "and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." Ramos was based on the deprivation of statutorily granted peremptory challenges, not on constitutional grounds. It is that decision that was overruled in Lindell.

In the opposite situation — where a juror is unnecessarily removed for cause, automatic reversal is not required. State v. Mendoza, 227 Wis.2d 838, 856-64, 596 N.W.2d 736 (1999); State v. Jimmie R.R., 2000 WI App 5, ¶25, 232 Wis.2d 138, 606 N.W.2d 196.

31. Note that a penalty of life imprisonment applies not only to Class A felonies but also to life sentences for persistent repeaters under § 939.62(2m). See State v. Erickson, 227 Wis.2d 758, 596 N.W.2d 749 (1999).

32. Section 972.03 provides in part:

> If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges.

If the crime is punishable by life imprisonment, the number increases to 12 if there are two defendants and to 18 if there are three defendants. Id.

33. State v. Nantelle, 2000 WI App 110, 235 Wis.2d 91, 612 N.W.2d 356.

34. In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court reexamined the portion of Swain v. Alabama, 380 U.S. 202 (1965), relating to the evidentiary burden a defendant must meet to show unfair use of racially-based peremptory challenges. The following new test was announced:

> . . . a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

476 U.S. 79, 96.

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The Wisconsin Supreme Court applied the Batson decision in State v. Walker, 154 Wis.2d 158, 453 N.W.2d 127 (1990), reversing a conviction because the record showed "an unrebutted prima facie case of purposeful discrimination." 154 Wis.2d 158, 179. See State v. Waites, 158 Wis.2d 376, 462 N.W.2d 206 (1990), where the court found the Batson claim was waived. Also see State v. Lamon, 2003 WI 78, 262 Wis.2d 747, 664 N.W.2d 607, which did not articulate new legal principles but did provide a detailed example of reasons found to be race-neutral.

35. Powers v. Ohio, 499 U.S. 400 (1991).

36. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); State v. Joe C., 186 Wis.2d 580, 522 N.W.2d 222 (Ct. App. 1994); State v. Jagodinsky, 209 Wis.2d 577, 563 N.W.2d 188 (Ct. App. 1997).

37. State v. Jones, 218 Wis.2d 599, 581 N.W.2d 561 (Ct. App. 1998).

38. The three-part test is the one developed in Batson v. Kentucky, 476 U.S.79 (1986), for cases involving racial discrimination. It also applies to gender discrimination. State v. King, 215 Wis.2d 295, 572 N.W.2d 530 (Ct. App. 1997); State v. Jagodinsky, 209 Wis.2d 577, 563 N.W.2d 188 (Ct. App. 1997).

39. For a case finding a failure to make the required prima facie showing of race-based peremptory, see State v. Lopez, 173 Wis.2d 724, 496 N.W.2d 617 (Ct. App. 1992).

40. The party defending a claim of use of peremptories for discriminatory purposes "must offer something more than a bald, but otherwise credible, statement that other nonprohibited factors were considered. Rather, he or she must demonstrate how there is a nexus between these legitimate factors and the juror who was struck." State v. Jagodinsky, 209 Wis.2d 577, 584-85, 563 N.W.2d 188 (Ct. App. 1977).

Fears that a bilingual juror would be unable to rely exclusively on the court interpreter's version of testimony is a race-neutral ground for exercising a peremptory challenge. Hernandez v. New York, 500 U.S. 352 (1991).

The following were found to be racially neutral reasons in State v. Gregory, 2001 WI App 107, ¶12, 244 Wis.2d 65, 630 N.W.2d 711: concern about the juror's truthfulness; family members with relationship with cocaine, the substance on which the charge was based; close proximity to the alleged drug house; and, a concern that the juror's uncle could have been recently arrested for involvement with drug trafficking.

41. Whether to include preliminary instructions at this point depends on the preference of the trial judge and other factors, such as the amount of time that may pass before the trial begins. Wis JI-Criminal 50 includes recommended preliminary instructions and cautions regarding juror's use of electronic communication devices.

42. "[T]he jury in this case was not a classic 'anonymous' jury. Notwithstanding whether the jury in this case is characterized as an 'anonymous' or a 'numbers' jury, if restrictions are placed on juror identification or information, due process concerns are raised regarding a defendant's rights to an impartial jury and a presumption of innocence. Accordingly, although this case does not deal with the classic 'anonymous' jury, the reasoning in cases involving anonymous juries is beneficial to our analysis." State v. Tucker, 2003 WI 12, ¶11.

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43. Tucker offered the following as illustrations of statements that have been made by courts in other jurisdictions: United States v. DeLuca, 137 F.3d 24 (1st Cir. 1998) (district court may instruct jury that their identities will be withheld to ensure that no extrajudicial information is conveyed to them); United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988) (district court may instruct jury that their anonymity is a precautionary measure to ensure that both sides get a fair trial); State v. Samonte, 928 P.2d 1 (Haw. 1996) (circuit court may instruct jury that anonymity is to protect jurors from contacts by the news media); State v. Bowles, 530 N.W.2d 521 (Minn. 1995) (circuit court may instruct jury that purpose of anonymity is to shield jurors from media harassment and undesirable publicity); State v. McKenzie, 532 N.W.2d 210 (Minn. 1995) (circuit court may instruct jury that they will remain anonymous to shield them from media harassment and ward off curiosity that might infringe on their privacy). State v. Tucker, 2003 WI 12, ¶24.

44. The model is also published as a freestanding instruction. See Wis JI-Criminal 146.

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SM-21 WAIVER OF JURY TRIAL: ACCEPTANCE, WITHDRAWAL, AND RELATED ISSUES

The following is intended for use when a defendant with counsel wishes to waive a jury trial.[1] If the defendant is without counsel, it may be necessary to obtain or renew a waiver of counsel. See SM-30, Waiver and Forfeiture of Counsel.

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I. Accepting or Rejecting a Proposed Jury Trial Waiver

A. Consent of the State

The court should first ask the prosecutor whether the State consents to a proffered jury trial waiver. Section 972.02(1) provides that a jury trial waiver requires the consent of the state. The State is not required to offer reasons for refusing to consent.[2]

B. Trial Court Authority to Reject a Waiver

The trial court has authority to reject a jury trial waiver even if the State consents. Like the State's decision to withhold consent, the trial court need not explain its decision and, absent extraordinary circumstances, that decision is not reviewable.[3]

II. Determining the Defendant's Ability to Understand the Waiver

As with any waiver, the waiver of the right to a jury trial requires that the defendant make an understanding and intelligent decision. This may require an investigation of the defendant's background, present mental condition, etc. For suggested questions designed to explore this aspect of a waiver decision, see SM-32, ACCEPTING A PLEA OF GUILTY, at section II.

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III. Determining that the Waiver is Knowing and Voluntary

A jury trial waiver must be made personally, knowingly, and voluntarily. A personal inquiry is required and the record must clearly indicate the defendant's willingness and intent to waive the right to a jury trial.[4] The following are examples of questions that should be asked. Answers indicating the need for more information should be pursued.

> Before your waiver of your constitutional right to a jury trial is accepted, the court will ask you some questions to decide whether your waiver should be accepted. If you have any trouble understanding the questions, please tell me, and take all the time you need to confer with your attorney.
>
> Do you understand that you have the right to a jury trial, that is to have twelve people hear all the evidence in the case and decide whether you are guilty or not guilty?
>
> Do you understand that in a jury trial, the State must convince each member of the jury beyond a reasonable doubt that you committed the crime?[5]
>
> Do you understand that by giving up your right to a jury trial, this court, after hearing all of the evidence, will make a decision on whether you are guilty beyond a reasonable doubt or not guilty?
>
> Has anyone promised you anything to get you to give up your right to a jury trial?
>
> Has anyone threatened you to get you to give up your right to a jury trial?
>
> Knowing what I have just told you, do you still wish to give up your right to a jury trial?
>
> Have you had enough time to discuss this with your attorney?
>
> Has your attorney explained your right to a jury trial to you?
>
> Do you understand the questions I have asked and understand what your attorney has told you?

DIRECT THE FOLLOWING QUESTION TO DEFENSE COUNSEL:

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> Do you believe that the defendant understands the right to a jury trial and the right to a unanimous verdict and is giving up those rights freely, voluntarily, and intelligently?

IF THE COURT IS SATISFIED THAT DEFENDANT'S WAIVER OF A JURY TRIAL IS MADE FREELY, VOLUNTARILY, AND KNOWINGLY, AND THE COURT APPROVES, THE COURT SHOULD MAKE FINDINGS OF FACT, ON THE RECORD, SUBSTANTIALLY AS FOLLOWS:

> The court finds that the defendant understands the constitutional right to a jury trial and that the defendant freely and voluntarily waives that right.

IV. Related Issues

A. Agreeing to a Jury of Less Than Twelve

Section 972.02(2) provides as follows:

> At any time before the verdict in a felony case, the parties may stipulate in writing or by statement in open court, on the record, with the approval of the court, that the jury shall consist of any number less than 12.

The procedures required for waiver of trial by jury apply equally to waiver of a full 12-member jury. State v. Cooley, 105 Wis.2d 642, 646, 315 N.W.2d 369 (Ct. App. 1981).

B. Waiver of a Unanimous Verdict

This question was referred to in State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), in connection with the second phase of the bifurcated trial held where a defendant enters a plea of not guilty by reason of mental disease or defect. At the time of the decision, the statute did not, as it does now, provide explicitly for a 5/6 verdict at the second phase. There was uncertainty about whether the second phase verdict had to be unanimous. The court of appeals held that a unanimous verdict was required and that it was so fundamental a right that it could not be waived. State v. Koput, 134 Wis.2d 195, 396 N.W.2d 773 (Ct. App. 1986). The supreme court reversed, but because it held that the verdict was to be 5/6, it did not have to address the waiver issue.

The rule that a unanimous verdict is a right too fundamental to be waived is apparently the common law rule. However, several states do allow such waivers.[6] The ABA Standards for Criminal Justice allow a waiver of a unanimous verdict. Standard 15-1.3(b) (2nd ed. 1980). The court of appeals decision in Koput had relied on a previous holding that there

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could be no waiver of the unanimous verdict. That holding, Holland v. State, 87 Wis.2d 567, 275 N.W.2d 162 (Ct. App. 1978), was reversed on other grounds, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

C. Partial Jury Trial Waiver

In some situations, a defendant may wish to stipulate that one element of an offense is established. This might be viewed as a waiver of the right to a jury trial on that element. If so, does the acceptance of the stipulation require a partial jury trial waiver and an appropriate inquiry into the defendant's ability to give that waiver? In State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), the trial court accepted a stipulation from the prosecutor and defense counsel that the question of whether the offense was committed while armed with a dangerous weapon would be decided by the court instead of the jury. The court of appeals held that this was error: withdrawal of that element from the jury required a personal waiver from the defendant.

V. Withdrawal of a Jury Trial Waiver

In State v. Cloud, 133 Wis.2d 58, 393 N.W.2d 123 (Ct. App. 1986), the court characterized the question of "[w]hether, and under what circumstances, a defendant may withdraw a valid jury waiver" as one "of first impression in this state." 133 Wis.2d 58, 63. The court adopted an abuse of discretion standard for evaluating a trial court's refusal to allow withdrawal of a jury trial waiver, but went further to hold "that it is an abuse of discretion for a trial court to deny a criminal defendant's motion to withdraw a jury waiver if there is no showing that granting withdrawal would have substantially delayed or impeded the cause of justice." 133 Wis.2d 58, 65.

COMMENT

SM-21 was originally published in 1990. Footnote 3 was modified in April 1991. This revision was approved by the Committee in August 2004.

Section 972.02(1) provides that "criminal cases shall be tried by a jury . . . unless the defendant waives a jury in writing or by statement in open court . . . on the record, with the approval of the court and the consent of the state." (The statute allows the waiver to be accepted by telephone under § 967.08.)

The Wisconsin statute was modeled after Rule 23 of the Federal Rules of Criminal Procedure. State v. Cook, 141 Wis.2d 42, 413 N.W.2d 647 (Ct. App. 1987).

Also see CR16-1, Wisconsin Judicial Benchbook - Criminal-Traffic.

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All the requirements of § 972.02 and the case law interpreting it do not apply to jury trial waivers in Chapter 980 commitment proceedings. See § 980.05(2). State v. Bernstein, 231 Wis.2d 292, 605 N.W.2d 555 (Ct. App. 1999); State v. Denman, 2001 WI App 96, 243 Wis.2d 14, 626 N.W.2d 296.

1. The procedure recommended here applies regardless of the time the waiver is offered. In Warrix v. State, 50 Wis.2d 368, 184 N.W.2d 189 (1971), the court interpreted § 957.01, the predecessor to present § 972.02. It held that nothing in the statute prohibited the acceptance of a jury waiver after the trial to a jury had begun. The court noted, however, that "[i]f a judge believes he cannot recollect the testimony or did not make notes to help him or for any reason he cannot function as the trier of the facts he needs only to refuse to accept the offer to waive the jury." 50 Wis.2d 368, 372.

2. Section 972.02(1) provides that a jury trial waiver requires the consent of the state. In State v. Cook, 141 Wis.2d 42, 413 N.W.2d 647 (Ct. App. 1987), the Wisconsin Court of Appeals held that the state is not required to justify its refusal to consent to a defendant's jury trial waiver. It relied on Singer v. United States, 380 U.S. 24 (1965), which reached the same result in interpreting Rule 23 of the Federal Rules of Criminal Procedure. Section 972.02 was modeled after Rule 23. The court did note that a different result might be required if there was a showing of exceptional circumstances, such as denial of equal protection.

3. In State v. Burks, 2004 WI App 14, 268 Wis.2d 747, 674 N.W.2d 640, the court held that "the trial court's 'approval' of a defendant's jury-trial waiver under Wis. Stat. § 972.02(1) is not [a] quasi-ministerial rubber-stamping of the parties' request. . . Rather, . . . , like the prosecution's decision to withhold consent to a defendant's request to waive his or her right to a jury trial, the trial court also need not explain its decision to withhold its approval, and absent extraordinary circumstances not present here, its decision to withhold approval, like the prosecution's decision to withhold consent, is not reviewable." Burks, ¶10.

4. In State v. Anderson, 2002 WI 7, ¶29, 249 Wis.2d 586, 638 N.W.2d 301, the court stated: "Although Anderson submitted a written jury trial waiver form, we find that the circuit court erred by failing to engage Anderson in a personal colloquy regarding the jury trial waiver. . . [W]e mandate the use of a personal colloquy in every case . . ." The court identified four matters that the personal colloquy must cover: 1) a deliberate choice, absent threats or promises, to proceed without trial; 2) awareness that a jury consists of 12 people who must all agree on all elements of the crime charged; 3) awareness that in a court trial the judge decides whether the defendant is guilty; and, 4) that there was enough time to discuss the decision with counsel. Anderson, ¶24.

Also see State v. Cloud, 133 Wis.2d 58, 62, 393 N.W.2d 123 (Ct. App. 1986), citing State v. Moore, 97 Wis.2d 669, 671, 294 N.W.2d 551, 553 (Ct. App. 1980).

Section 972.02 and appellate decisions emphasize that the record must reflect the jury trial waiver and that a waiver will not be implied from a defendant's acquiescence in a trial to the court. In State v. Krueger, the Wisconsin Supreme Court held: ". . . henceforth a record demonstrating the defendant's willingness and intent to give up the right to be tried by a jury must be established before the waiver is accepted." 84 Wis.2d 272, 282, 267 N.W.2d 602 (1978).

However, the Krueger decision did not adopt a specific procedure for making the required record. It cited two methods with approval:

1) having the district attorney develop the record by asking questions of the defendant. See White v. State, 45 Wis.2d 672, 682, 173 N.W.2d 649 (1970).

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2) placing the responsibility on the trial court as suggested by the ABA Standards Relating to Trial by Jury, sec.1.2(b) (1968). Commentary to that section [which is sec. 15-1.2(b) of the 2nd edition, 1980] was cited with approval in State v. Cloud, supra:

> It may well be that a defendant who has been informed by counsel or is otherwise aware of the right to trial by jury may intelligently waive that right without further admonishment from the court. However, consistent with the approach which has been taken with regard to entry of a plea of guilty, the better practice is for a court to advise a defendant of the right to jury trial before accepting a waiver. As one court has observed: "'[T]he serious and weighty responsibility' of determining whether [the defendant] wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make 'an intelligent and competent waiver.'" When the record or a written waiver establishes that a defendant was specifically advised that he or she could be tried by a jury, a subsequent attack on the waiver by the defendant is not likely to prevail.

3 Standards for Criminal Justice, sec. 15-1.2(b) commentary at 15.24 (2d ed. 1980), cited at 133 Wis.2d 58, 62.

The requirement that the defendant personally waive the right to a jury trial was reemphasized in State v. Livingston, 159 Wis.2d 561, 464 N.W.2d 839 (1991):

> . . . we hold that any waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally; he and only he has the power and authority to waive his right to a jury trial, and that power and authority is legally effective only by virtue of an affirmative act by him. Neither counsel nor the court nor any other entity can act in any way or to any degree so as to waive on the defendant's behalf his right to trial by jury. The affirmative act by the defendant, in order to constitute a personal waiver, must be such as to comply with at least one of the specific means of effecting a waiver provided in sec. 972.02(1), and the court and the state must consent in order for a waiver to occur in accordance with the statute. The record must clearly demonstrate the defendant's personal waiver; the personal waiver may not be inferred or presumed. All of these concerns reflect the fact that the ultimate question is what the defendant wants—a court trial or a jury trial; it is his decision, no matter what advice he has received. If the defendant waives the jury "in writing" under the statute when accepting the written waiver, the judge still should question the defendant as to the voluntariness and understanding of his action.

159 Wis.2d 561, 569-70.

The questions suggested here assume that the court will conduct the inquiry. While the recent jury trial waiver cases seem to assume that the court will do so, there appears to be no prohibition against having the prosecutor or defense counsel take the responsibility. This was noted by the Wisconsin Supreme Court in the Livingston case, supra:

> . . . we would add that defense counsel has a corresponding responsibility to ensure that the record of jury waiver is developed and failure to meet this responsibility can sometimes be considered inadequate representation by counsel. We also consider that in accordance with

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> sec. 972.02(1), Stats., the district attorney bears a professional responsibility to develop an adequate record of the defendant's personal waiver of the jury.

159 Wis.2d 561, 570-71.

5. This question is based on the statement recommended in SM-32, Accepting a Plea of Guilty. It is intended to comply with the requirement imposed in State v. Resio, 148 Wis.2d 687, 436 N.W.2d 603 (1989). The court held:

> Although we have determined that knowledge of the unanimity requirement is not constitutionally required for a valid jury waiver, as a matter of judicial administration pursuant to our powers under Art. VII sec. 3 of the Wisconsin Constitution, we direct that, from the date of the mandate of this decision, a circuit court in a criminal case must advise the defendant that the court cannot accept a jury verdict that is not agreed to by each member of the jury.

148 Wis.2d 687, 696-97.

6. Cases are collected at Annotation: Validity and Efficacy of Accused's Waiver of Unanimous Verdict, 97 A.L.R.3d 1253.

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SM-25 JUDGE'S DUTY AT INITIAL APPEARANCE

[WITHDRAWN]

COMMENT

SM-25 was published in 1987. It was withdrawn by the Committee in 2010.

See "Initial Appearance" CR7-3, Wisconsin Judicial Benchbook, Criminal and Traffic.

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SM-28 INQUIRY REGARDING THE DECISION WHETHER TO TESTIFY

THE FOLLOWING IS REQUIRED WHEN THE DEFENDANT SEEKS TO WAIVE THE RIGHT TO TESTIFY. IT IS RECOMMENDED WHEN THE DEFENDANT HAS DECIDED TO TESTIFY

DIRECT THE FOLLOWING QUESTIONS TO THE DEFENDANT:

"Do you understand that you have a constitutional right to testify?"

"And do you understand that you have a constitutional right not to testify?"

"Do you understand that the decision whether to testify is for you to make?"

"Has anyone made any threats or promises to you to influence your decision?"

"Have you discussed your decision whether or not to testify with your lawyer?"

"Have you made a decision?"

"What is that decision?"

DIRECT THE FOLLOWING QUESTIONS TO DEFENSE COUNSEL:

"Have you had sufficient opportunity to thoroughly discuss this case and the decision whether to testify with the defendant?"

"Are you satisfied that the defendant is making the decision knowingly, intelligently, and voluntarily?"

THE COURT SHOULD STATE THE APPROPRIATE FINDING ON THE RECORD.

COMMENT

SM-28 was originally published in 2004. The Comment was updated in 2005 and 2009. This revision was approved by the Committee in July 2011 to address State v. Denson, 2011 WI 70, 335 Wis.2d 681, 799 N.W.2d 831.

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This Special Material is intended to provide a framework for implementing the requirement established in State v. Weed, 2003 WI 85, 263 Wis.2d 434, 666 N.W.2d 485:

> . . . in order to determine whether a criminal defendant is waiving his or her right to testify, a circuit court should conduct an on-the-record colloquy with the defendant outside the presence of the jury. The colloquy should consist of a basic inquiry to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel. ¶43.

Weed requires the colloquy only when a defendant seeks to waive the right to testify. The Committee concluded that a similar inquiry should be conducted when the defendant decides to testify, because a constitutional right is involved regardless of the decision that is made. In State v. Jaramillo, 2009 WI App 39, ¶17, 316 Wis.2d 538, 765 N.W.2d 855, the Wisconsin Court of Appeals noted that while it lacked the authority to require a colloquy where a defendant decides to testify, "we do recommend it as good practice," citing this Comment.

In State v. Denson, 2011 WI 70, 335 Wis.2d 681, 799 N.W.2d 831 , the Wisconsin Supreme Court addressed the question whether a colloquy is required when the defendant has decided to testify. The court concluded that while a fundamental constitutional right is involved, an on-the-record inquiry is not required. However, after noting there are some potential dangers in having the judge conduct a colloquy, the court recommended that an inquiry like that suggested in SM-28 be conducted. Relevant portions of the Denson decision follow.

> ¶8 A criminal defendant's constitutional right not to testify is a fundamental right that must be waived knowingly, voluntarily, and intelligently. However, we conclude that circuit courts are not required to conduct an on-the-record colloquy to determine whether a defendant is knowingly, voluntarily, and intelligently waiving his or her right not to testify. While we recommend such a colloquy as the better practice, we decline to extend the mandate pronounced in Weed. In any case, once a defendant properly raises in a postconviction motion the issue of an invalid waiver of the right not to testify, an evidentiary hearing is an appropriate remedy to ensure that the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify.
>
> . . . .
>
> ¶64 As the Weed court recognized, we are in the small minority of jurisdictions that impose an affirmative duty upon circuit courts to conduct an on-the-record colloquy to ensure that a criminal defendant is knowingly, intelligently, and voluntarily waiving his or her right to testify. 263 Wis. 2d 434, ¶41. The vast majority of jurisdictions do not impose such a duty upon circuit courts, and in fact, many jurisdictions advise against it. Their reasons for not mandating an on-the-record colloquy are many. [Citations omitted.] The most notable include that by advising the defendant of his or her right to testify, the circuit court might inadvertently influence the defendant to waive his or her right not to testify, might improperly intrude upon the attorney-client relationship or interfere with defense strategy, or might lead the defendant into believing that his or her defense counsel is somehow deficient.
>
> ¶65 We believe that these risks apply with even greater force to a circuit court's inquiry into a criminal defendant's decision to testify. Defense counsel has the primary responsibility for advising the defendant of his or her corollary rights to testify and not to testify and for explaining the tactical implications of both. . . . In that sense, we believe it "unlikely that a competent defense

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counsel would allow a defendant to take the stand without a full explanation of the right to remain silent and the possible consequences of waiving that right." Once a defendant, counseled by his or her attorney, makes the decision to testify, a circuit court's inquiry into whether the defendant is aware of his or her corollary right not to testify runs a real risk of interfering with defense strategy and inadvertently suggesting to the defendant that the court disapproves of his or her decision to testify. . . .

¶66 Therefore, different from our conclusion in Weed, see 263 Wis. 2d 434, ¶¶41-42, we conclude that the risk that a circuit court's inquiry into a criminal defendant's decision to testify will influence the defendant to waive his or her right to testify or will improperly interfere with defense strategy outweighs the benefit of mandating an on-the-record colloquy to ensure that the defendant is knowingly, voluntarily, and intelligently waiving his or her right not to testify.

¶67 At the same time, as a practical matter, we recognize that conducting an on-the-record colloquy "is the clearest and most efficient means" of ensuring that the defendant has validly waived his or her right not to testify "and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions." See Klessig, 211 Wis.2d at 206; see also Anderson, 249 Wis. 2d 586, ¶23. Here, for instance, we are mindful of the fact that had the circuit court engaged Denson in an on-the-record colloquy regarding his right not to testify, this case likely would not be before us. Accordingly, we recommend an on-the-record colloquy as the better practice. In fact, the Special Materials prepared by the Wisconsin Criminal Jury Instructions Committee already direct circuit courts to inquire into a criminal defendant's understanding of both the right to testify and the right not to testify. See Wis JI-Criminal SM-28.

The Committee recommends conducting this inquiry at the time the defense case is presented, as opposed to doing so at an earlier time. The decision should be made in context, when the consequences of testifying or waiving the right to do so will be more clear.

The questions provided here are just suggestions. If the defendant's replies indicate a possible lack of understanding, follow-up questions or allowing additional consultation between the defendant and defense counsel may be advisable.

For a case finding a waiver colloquy sufficient in light of the Weed requirements, see State v. Arredondo, 2004 WI App 7, 269 Wis.2d 369, 674 N.W.2d 647. Arredondo also addressed the standards to be applied if, after executing a valid waiver, a defendant seeks to reopen the testimony to allow him testify.

In State v. McDowell, 2004 WI 70, 272 Wis.2d 488, 681 N.W.2d 500, the Wisconsin Supreme Court imposed an additional obligation on the trial court in cases where defense counsel seeks to use the narrative approach in eliciting the defendant's testimony because of concern that the defendant may testify falsely. The court first concluded that "defense counsel may not substitute narrative questioning for the traditional question and answer format unless counsel knows the client intends to testify falsely. Absent the most extraordinary circumstances, such knowledge must be based on the client's expressed admission of intent to testify untruthfully." ¶3. If this standard is met, "the attorney's first duty shall be to attempt to dissuade the client from the unlawful course of conduct." ¶45. If counsel believes this advice will not be followed, "an attorney should seriously consider moving to withdraw from the case." ¶46. If the motion is denied, "counsel should proceed with the narrative form, advising the defendant beforehand of what that would

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entail." ¶47. Defense counsel also must advise the prosecutor and the court before using the narrative form. Upon being so advised, the court must proceed as follows:

> Courts, in turn, shall be required to examine both counsel and the defendant and make a record of the following: (1) the basis for counsel's conclusion that the defendant intends to testify falsely; (2) the defendant's understanding of the right to testify, notwithstanding the intent to testify falsely; and (3) the defendant's, and counsel's, understanding of the nature and limitations of the narrative questioning that will result. ¶48.

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SM-30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL

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SM-30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL

Scope

This Special Material addresses issues that may arise when a defendant expresses the desire to waive counsel or appears without counsel after being directed to obtain representation. In these situations, the trial court must identify accurately the situation that is presented, make the required inquiry and make proper findings.

When a defendant affirmatively wishes to waive counsel, an inquiry must be conducted to determine whether the defendant's waiver is voluntarily and understandingly made. This includes assuring that the defendant understands the benefits of being represented by counsel and the disadvantages of proceeding without counsel. The waiver inquiry must also explore the defendant's competence for self-representation. The Committee concluded that defendants who lack competence to represent themselves cannot execute a valid waiver of the right to counsel. A suggested inquiry, suggested findings, and commentary relating to waiver of counsel are found in Part I.

A defendant may also be found to have forfeited the right to counsel. Forfeiture may occur in situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. A trial court must warn a defendant that, if the defendant persists in specific conduct, the court will find that the right to counsel is forfeited. The court must also engage in a colloquy designed to assure that the defendant understands the benefits of being represented by counsel and the disadvantages of proceeding without counsel. As with the express waiver of counsel, the inquiry must also explore the defendant's competence for self-representation. The court should make a clear ruling when the court deems the right to counsel to have been forfeited and make factual findings to support that ruling. A suggested inquiry, suggested findings, and commentary relating to forfeiture of counsel are found in Part II.

What makes these cases difficult is that a constitutional right of the defendant is in question regardless of how the case is resolved. The defendant has the right to be represented by counsel but also has the right to waive counsel and proceed pro se. Further, the Wisconsin Supreme Court has reaffirmed the rule that Wisconsin trial courts must evaluate a defendant's competence to proceed pro se whenever defendants seek to represent

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themselves. Part III discusses the considerations relating to evaluation of competence for self-representation.

Parts IV and V consider related issues: the appointment and role of standby counsel; and so-called hybrid representation, which occurs when a represented defendant seeks to engage in self-representation only during certain stages of the trial.

Attempts to waive counsel, conduct that may result in forfeiture of counsel, and attempts at self-representation are often connected with the problems confronting defendants who do not qualify for State Public Defender representation who nevertheless cannot afford to retain private counsel. Courts have the inherent power to appoint counsel in some situations. This is discussed in Part VI.

I. Express Waiver of Counsel

A. Suggested Inquiry

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE PROCEEDINGS BEFORE ACCEPTING THE WAIVER. THE FOLLOWING ARE EXAMPLES OF AREAS THAT SHOULD BE THE SUBJECTS OF INQUIRY. ANSWERS INDICATING THE NEED FOR MORE INFORMATION SHOULD BE PURSUED. QUESTIONS SHOULD BE PHRASED IN A WAY THAT ENCOURAGES STATEMENTS FROM THE DEFENDANT THAT GO BEYOND SIMPLE "YES" AND "NO" ANSWERS.[1]

- Age

- Education and vocational training

- Present employment and employment history

- Present mental health condition and mental health history

- Present alcohol use and history of alcohol use

- Present medication or drug use

- Difficulty in understanding the court

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IF THE DEFENDANT UNDERSTANDS THE PROCEEDINGS, THE COURT MUST ASSURE THAT THE DEFENDANT UNDERSTANDS THE RIGHT TO COUNSEL AND UNDERSTANDS THE BENEFITS OF BEING REPRESENTED.[2]

1. "Do you want to be represented by a lawyer?"

2. "Do you understand that you have a constitutional right to be represented by a lawyer in this case?"

3. "Do you understand that you have the right to hire your own lawyer?"

4. "If you do not have enough money to hire your own lawyer, you may be entitled to have a lawyer appointed to represent you. Do you understand that?"[3]

5. "You are charged with _____, which carries a maximum penalty of imprisonment for _____ years and a fine of _____, or both. If you are represented by a lawyer, he or she may discover information or facts which would be helpful in your defense. A lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty. I want you to take this into consideration in deciding whether or not you want a lawyer to represent you."

"The trial will continue under the same legal rules that would apply if you had a lawyer. If you represent yourself, you will have to follow these rules. Because you are not trained in the law, this will make it hard for you to challenge the evidence presented by the state and hard for you to present any evidence that you want to present."

"If you decide to testify you will be sworn as a witness and can give testimony while you are acting as a witness. You will be asked questions by the other side at that time. However, you cannot try to testify while acting as your own lawyer."

6. "Do you understand that a lawyer may be able to help you present your case and that it will be very difficult for you to do a good job being your own lawyer?"

7. "Do you now wish to reconsider your decision not to have a lawyer?"

8. "Has anyone told you that you should not ask for appointment of a lawyer to represent you?"

9. "Has anyone made any promises or any threats or has anyone used any influence or pressure of any kind or force of any kind to get you not to ask for the appointment of a lawyer?"

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IF THE DEFENDANT INDICATES A CHANGE OF MIND AND NOW WANTS TO BE REPRESENTED BY A LAWYER, THE COURT SHOULD REFER THE CASE TO THE STATE PUBLIC DEFENDER OR ALLOW THE DEFENDANT TO SEEK PRIVATE COUNSEL.

IF THE DEFENDANT AFFIRMS THE DESIRE TO WAIVE COUNSEL, THE COURT SHOULD INQUIRE INTO THE DEFENDANT'S COMPETENCE FOR SELF-REPRESENTATION. INQUIRY INTO THE FOLLOWING AREAS IS RECOMMENDED; THE INFORMATION MAY HAVE BEEN ELICITED BY QUESTIONS ALREADY ASKED.[4]

- Level of education

- Level of literacy

- Ability to communicate in the courtroom

- Physical or psychological disability that may affect the ability to communicate in the courtroom

B. Use Of A Written Form

A standard form for a waiver of counsel has been adopted by the Judicial Conference. See, Waiver of Right To Counsel, CR-226.

Section 971.025(1) provides: "In all criminal actions and proceedings . . . the parties and court officials shall use the standard court forms adopted by the judicial conference . . ." The form may be supplemented with additional material. § 971.025(2).

Despite the fact that the use of the form is required, case law continues to require that the trial court conduct a colloquy to assure that a waiver of counsel is knowing and voluntary.

A proper integration of the colloquy and the form is illustrated by State v. Polak, 2002 WI App 120, 254 Wis.2d 585, 646 N.W.2d 845. The waiver of counsel was found to be supported by an adequate colloquy, the court noting that "we place particular emphasis on the written waiver of counsel form, used in conjunction with the oral colloquy, because that form unequivocally states Polak's awareness of the assistance an attorney could provide and that an attorney might discover helpful things unknown to Polak." Polak, ¶19. The court observed that the form was not used as a substitute for the colloquy, but to supplement it.

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C. Suggested Findings

1. Waiver of Counsel Accepted

AFTER THE COURT HAS CONDUCTED THE FOREGOING INQUIRY AND IF THE DEFENDANT PERSISTS IN THE REFUSAL TO BE REPRESENTED BY COUNSEL AND APPEARS TO BE COMPETENT TO REPRESENT HIMSELF OR HERSELF, THE COURT SHOULD MAKE FINDINGS OF FACT THAT INCLUDE FINDINGS ON THE FOLLOWING TOPICS:

- that the defendant understands the proceedings, understands the nature and seriousness of the charge, and understands the maximum penalties that can be imposed if the defendant is convicted;

- that the defendant understands that a lawyer may be of assistance, understands that a lawyer may be appointed if the defendant is indigent, and understands the disadvantages of self-representation;

- that the defendant voluntarily and freely waives the right to be represented by counsel and is making a deliberate choice to proceed without counsel; and

- that the defendant has the minimal competence necessary to try to represent himself or herself because [refer to the court's evaluation of the four factors identified in Pickens].

PROPER FINDINGS SHOULD CONCLUDE WITH AN EXPRESS STATEMENT THAT THE COURT CONCLUDES THAT THE DEFENDANT'S REQUEST FOR SELF-REPRESENTATION IS GRANTED.[5]

THE COMMITTEE SUGGESTS THAT A BRIEF INSTRUCTION BE GIVEN TO THE JURY IN A CASE WHERE THE DEFENDANT HAS WAIVED COUNSEL. SEE WIS JI-CRIMINAL 70.

2. Waiver of Counsel Denied[6]

DENIAL OF A WAIVER OF COUNSEL MUST BE SUPPORTED BY ONE OF THE FOLLOWING FINDINGS: (1) THAT THE DEFENDANT DOES NOT UNDERSTANDINGLY AND VOLUNTARILY WAIVE COUNSEL; (2) THAT THE DEFENDANT DOES NOT UNDERSTAND THE DISADVANTAGES OF SELF-REPRESENTATION; OR (3) THAT THE DEFENDANT LACKS THE MINIMAL COMPETENCE NECESSARY TO TRY TO REPRESENT HIMSELF OR HERSELF.

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PROPER FINDINGS SHOULD CONCLUDE WITH AN EXPRESS STATEMENT THAT THE COURT CONCLUDES THAT THE DEFENDANT'S REQUEST FOR SELF-REPRESENTATION IS DENIED, SUPPORTED BY FINDINGS OF FACT THAT INCLUDE FINDINGS ON THE BRACKETED MATERIAL THAT APPLIES:

- the defendant does not understand the seriousness of the charge and the maximum possible penalties; or

- the defendant does not understand that a lawyer may be of assistance and that a lawyer may be appointed if the defendant is indigent; or

- the defendant does not understand the disadvantages of self-representation; or

- the defendant does not possess the minimal competence necessary to try to represent himself or herself because [refer to the court's evaluation of the four factors identified in Pickens].[7]

D. Commentary

The questions in Part I. A. are recommended for use whenever it is necessary to accept an express waiver of counsel. The defendant's answers to the recommended questions will undoubtedly suggest additional questions that should be asked to enable the court to make a full and complete determination that the defendant understands the proceedings and the right to have a lawyer, including one appointed at public expense if the defendant is indigent. A voluntary waiver of counsel will not be inferred from a silent record.[8]

The questions assume that the defendant has made clear the intention to proceed without counsel. While the burden is on the court to make a record, the Committee believes that the defendant should always have the opportunity to discuss the matter with a lawyer (e.g., with a public defender if one is available.)[9]

Pickens v. State[10] held that a valid waiver of counsel in a self-representation case requires that the record reflect the following:

(a) the deliberate choice to proceed without counsel;

(b) awareness of the seriousness of the charges and the possible penalties; and

(c) awareness of the difficulties and disadvantages of self-representation.

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Pickens, 96 Wis.2d 549, 563.

While the Pickens decision recommended that a colloquy with the defendant address these issues, the Wisconsin Supreme Court later mandated that they be covered. In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the court stated:

> [T]he circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

The waiver of counsel inquiry has been modified in light of Klessig to explicitly address each of the required issues, including the disadvantages of self-representation.

II. Forfeiture of Counsel

A. Suggested Inquiry

THE COURT SHOULD IDENTIFY THE CONDUCT OF THE DEFENDANT THAT THE COURT BELIEVES PROVIDES A BASIS FOR FINDING A FORFEITURE OF THE RIGHT TO COUNSEL AND THEN ADDRESS THE DEFENDANT AS FOLLOWS:

"If you continue to engage in this conduct, the court will find that you are giving up your right to be represented by a lawyer. If that happens, the trial will continue and you will not have a lawyer to represent you.

1. "Do you understand that?

"You are charged with _____, which carries a maximum penalty of imprisonment for _____ years and a fine of _____, or both. If you are represented by a lawyer, he or she may discover information or facts that would help your defense. A lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty.

2. "Do you understand?

"The trial will continue under the same legal rules that would apply if you had a lawyer. If you represent yourself, you will have to follow these rules. Because you are not trained

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in the law, this will make it hard for you to challenge the evidence presented by the state and hard for you to present any evidence that you want to present.

"If you decide to testify, you will be sworn as a witness and can give testimony while you are acting as a witness. You will be asked questions by the other side at that time. However, you cannot try to testify while acting as your own lawyer.

3. "Do you understand that a lawyer may be able to help you present your case and that it will be very difficult for you to do a good job being your own lawyer?"

B. Suggested Findings

AFTER THE COURT HAS MADE THESE STATEMENTS AND ASKED ALL THE QUESTIONS AND IF THE DEFENDANT PERSISTS IN THE CONDUCT, THE COURT THEN, ON THE RECORD, SHOULD MAKE FINDINGS OF FACT THAT INCLUDE THE FOLLOWING TOPICS:

- that the defendant understands the charge, understands that a lawyer may be of assistance, and understands that the disadvantages of self representation; and

- that the defendant has refused to waive counsel expressly, but that the defendant has engaged in the following conduct: (describe conduct or refer to the conduct described in the colloquy with the defendant) ; and

- that this conduct has seriously disrupted the fair administration of justice in that: (describe the effects of the defendant's conduct) ; and

- that this requires the court to conclude that the defendant has forfeited the right to counsel.

C. Commentary

"Forfeiture" of counsel refers to situations where the defendant does not expressly waive counsel but, by conduct, gives up the right to representation. Other terms used to describe this situation are "constructive waiver," "waiver by conduct," and "waiver by operation of law." The term "forfeiture of counsel" is used here because it emphasizes that what is occurring is the loss of a right without the express waiver that is usually required. These situations often involve defendants who have difficulty getting along with counsel and thus may present questions whether to grant a motion to discharge counsel or a motion by counsel to withdraw.

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In State v. Newton, [decided sub nom. State v. Cummings, 199 Wis.2d 721, 546 N.W.2d 406 (1996)], the Wisconsin Supreme Court held that "there may be situations . . . where a circuit court must have the ability to find that a defendant has forfeited his right to counsel" [199 Wis.2d 721, 757] and found that the case before it presented that situation: "There can be no doubt from the record that Newton's behavior was manipulative and disruptive and that his continued dissatisfaction was based solely upon a desire to delay." 199 Wis.2d 721, 754. The court noted that a similar forfeiture situation was presented in State v. Woods, 144 Wis.2d 710, 424 N.W.2d 730 (Ct. App. 1988).

The Newton decision recommended that "trial courts in the future, when faced with a recalcitrant defendant," follow four steps spelled out in the dissenting opinion before finding that a defendant has forfeited counsel[11]:

(1) provide explicit warnings that, if the defendant persists in specific conduct, the court will find that the right to counsel is forfeited;

(2) engage in a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation;

(3) make a clear ruling when the court deems the right to counsel to have been forfeited; and

(4) make factual findings to support the court's ruling.

To implement this four-step approach, the Committee recommends the statements and questions set forth in Part II. A. A finding that the right to counsel is forfeited will mean that the defendant will proceed without a lawyer. Where counsel is waived expressly, an inquiry into competence for self-representation is required. [See discussion in Section I.] It is not clear that an inquiry into competence for self-representation is required or would be appropriate where the right to counsel is forfeited rather than expressly waived.

In State v. Coleman, 2002 WI App 100, 253 Wis.2d 693, 644 N.W.2d 383, the court found that grounds for forfeiture of counsel were not established. There were three significant omissions: no specific warning that firing his attorneys would result in forfeiture of his right to counsel; no colloquy to determine understanding of the difficulties of proceeding without counsel; and, no clear ruling that Coleman had forfeited his right to counsel. The trial court was also deficient in not making a finding that Coleman was competent to represent himself. SM-30 is referred to as a "helpful discussion." Coleman, footnote 3.

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III. Self-Representation

Defendants in criminal cases have the right, under both the United States[12] and Wisconsin Constitutions,[13] to represent themselves. Where there has been a clear[14] and timely[15] request to exercise this right, the trial court must conduct a careful inquiry covering several different concerns. The trial court must first assure that there is an intelligent and voluntary waiver of the right to be represented by counsel. (As discussed in Part I.) Self-representation cases also often present situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. (As addressed in Part II.) A finding of competence for self-representation is required where the defendant has forfeited the right to counsel, just as it is where there is an express waiver of counsel. State v. Coleman, 2002 WI App 100, 253 Wis.2d 693, 644 N.W.2d 283.

In addition to the waiver inquiry, the court must assure that the defendant understands the disadvantages of self-representation. The trial court is also required to inquire whether defendants are "competent" to represent themselves. This requirement has been reaffirmed by the Wisconsin Supreme Court in 1997 and 2005. (See State v. Klessig and State v. Ernst, below.)

The leading Wisconsin case on self-representation is Pickens v. State.[16] Pickens held that a valid waiver in the self-representation case requires that the record reflect the following:

(a) the deliberate choice to proceed without counsel;

(b) awareness of the seriousness of the charges and the possible penalties; and

(c) awareness of the difficulties and disadvantages of self-representation.

Pickens, 96 Wis.2d 549, 563.

While the Pickens decision recommended that a colloquy with the defendant address these issues, the Wisconsin Supreme Court later mandated that they be covered. In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the court stated:

> [T]he circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the

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seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

The waiver of counsel inquiry[17] has been modified in light of Klessig to explicitly address each of the required issues, including the disadvantages of self-representation.

In State v. Ernst, 2005 WI 107, ¶21, 283 Wis.2d 300, 699 N.W.2d 92, the Wisconsin Supreme Court held: "We conclude that the Klessig colloquy requirement was and is a valid use of the court's superintending and administrative authority, . . . and that such a rule does not conflict in any way with the United States Supreme Court's decision in Tovar . . ." The reference is to Iowa v. Tovar, 541 U.S. 77 (2004), where the court held that a valid waiver of the Sixth Amendment right to counsel did not require specific advice from the court that waiver of counsel might result in a viable defense being overlooked and losing the opportunity for an independent opinion on whether pleading guilty is a wise choice.

A. Understanding the Disadvantages of Self-Representation

The disadvantages of self-representation are to a significant degree the mirror image of the benefits of representation by counsel that are described in the waiver of counsel inquiry. The additional factors that should be covered include the general conclusion that self-representation is not wise (the old adage that "the lawyer who represents himself has a fool for a client" was used several times by the trial court in the Pickens case) and the more specific caution that the rules governing courtroom procedures will be applied during the trial and that the defendant will be expected to abide by them. In Pickens, the trial court gave the following advice:

> Do you understand that this is a courtroom, we operate under certain legal rules, and you will be expected to comply with those. I will perhaps give some latitude because you are not trained in the law, but you will have to, even though you are not educated in the law, try your lawsuit in accordance with those rules. Do you understand that?

Pickens, 96 Wis.2d 549, 560-61.

It may be advisable to elaborate upon some of these matters by explaining the following:

(1) that the judge will not represent the defendant or protect the defendant's interests in the same manner a lawyer would;

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(2) that if the defendant wishes to testify, the defendant must be sworn as a witness and submit to cross-examination — the defendant cannot try to "testify" while acting in the "lawyer" capacity;

(3) that valid objections to questions will be sustained despite the fact that lack of legal training will make it difficult for the defendant to conduct direct or cross-examination in the proper way.

In State v. Clutter, 230 Wis.2d 472, 477, 602 N.W.2d 324 (Ct. App.1999), the court addressed the risks that are involved with a decision to proceed pro se:

> Inherent in a defendant's decision to represent himself is the risk that a defense not known to him will not be presented during trial. When a defendant undertakes pro se representation that is the risk he knowingly assumes. If his strategy in proceeding pro se results in a valid defense being waived, it reflects the hazards of his decision to waive counsel. To rescue this defendant from the folly of his choice to represent himself would diminish the serious consequences of the decision he made when he elected to waive counsel.

B. "Competence" for Self-Representation

Even if there has been a valid waiver of counsel and the defendant understands the disadvantages of self-representation, the trial court must assure that the defendant has the "competence" or capacity for self-representation. This is not the same as "competency to stand trial."[18] "Thus, despite the fact that a defendant has been found competent to stand trial, it may, nevertheless, be determined that he lacks the capacity to represent himself." Pickens v. State, 96 Wis.2d 549, 568.

In State v. Klessig, 199 Wis.2d 397, 544 N.W.2d 605 (Ct. App. 1996), the court of appeals eliminated the requirement for an inquiry into competence for self-representation, holding that law "changed when the United States Supreme Court decided Godinez v. Moran, 113 S. Ct. 2680 (1993)." In Godinez, the court concluded that the only inquiry into competence required for a waiver of the right to counsel was the competence necessary to stand trial. The court of appeals' Klessig decision concluded:

> Once a defendant has been found competent to stand trial, a trial court may not engage in further or heightened competency requirements addressing the defendant's possession of skills, intelligence or experiences that would be sufficient to permit him to adequately represent his best interests at trial. 199 Wis.2d 397, 405.

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The Wisconsin Supreme Court reversed the court of appeals in State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), reaffirming the Pickens holding that competency for self-representation is different from competency to stand trial:

> We thus reaffirm the holding in Pickens as still controlling on the issue of competency. In Wisconsin, there is still a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial. . . . Accordingly, the circuit court's determination of a defendant's competency to proceed pro se must appear in the record.

The court of appeals had held that the Pickens requirement no longer applied because the United States Supreme Court decision in Godinez v. Moran established that there was a single standard for competency — if a defendant was competent to stand trial that defendant could represent himself without further inquiry into his ability to do so. The Wisconsin Supreme Court concluded that Godinez was concerned with minimal requirements and allowed states to impose higher standards as a matter of state law. The court said its reaffirmation of the higher Pickens standard "stems from the independent adoption of the higher standard by the state as allowed under Godinez."

Wisconsin, with its reaffirmed Pickens standard, is in the minority in recognizing a requirement of "competence" for self-representation. The majority view in the country apparently stresses the awareness of the disadvantages of proceeding pro se — if the defendant understands the disadvantages but wishes to go ahead, self-representation should be allowed. For example, the ABA Standards for Criminal Justice refer to "competence to represent oneself" but define it in terms of understanding the consequences of the decision to proceed without a lawyer.[19]

The Pickens court recognized that the determination of competence for self-representation "must necessarily rest to a large extent upon the judgment and experience of the trial judge" and that "the trial court must be given sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result." 96 Wis.2d 549, 569.

Factors to consider in determining whether the defendant "possesses the minimal competence necessary to conduct his own defense" include:

(1) education

(2) literacy

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(3) fluency in English

(4) any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.

Pickens v. State, 96 Wis.2d 549, 569; reaffirmed in State v. Klessig, 211 Wis.2d 194, 212.

CAUTION: Persons of average intelligence are entitled to represent themselves. A request for self-representation "should be denied only where a specific problem of disability can be identified which may prevent a meaningful defense from being offered, should one exist." Pickens, 96 Wis.2d 549, 569. Technical legal knowledge, as such, is not relevant to an assessment of a knowing exercise of the right to defend oneself. Faretta v. California, 422 U.S. 806, 836 (1975).

The cases dealing with self-representation recognize the difficult position of the trial judge. The difficulty is due to the fact that the defendant has a constitutionally-protected right on either side of the issue. The court addressed this in Klessig, stating that if the defendant's competence for self-representation is not established, "the circuit court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel. However, if the defendant knowingly, intelligently, and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow him to do so or deprive him of his right to represent himself." State v. Klessig, 211 Wis.2d 194, 203-04. Complete and proper findings are extremely important in these cases.[20] If the request for self-representation is granted, the record must reflect that the defendant:

1. understands the seriousness of the charge and the maximum possible penalties;

2. understands that the defendant has the right to be represented by a lawyer;

3. understands that if the defendant is indigent, a lawyer will be appointed at public expense;

4. understands the advantages of being represented by counsel and the disadvantages of self-representation; and

5. has the minimal competence necessary to try to conduct his or her own defense. These matters are reflect in the suggested findings included in Part I. A.

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If the request for self-representation is denied, the Committee has concluded that, based on the Klessig decision, the waiver of counsel must be denied. That is, the right to waive counsel, in Wisconsin, depends on a finding that the defendant is competent to proceed pro se. A defendant who is not competent to proceed pro se, cannot waive counsel. The suggested findings included in Part I. B. reflect this conclusion.

IV. Appointment of Standby Counsel

"Standby counsel" refers to the appointment of a lawyer to assist the defendant whose request for self-representation has been granted.

The authority to appoint standby counsel is recognized as included in the inherent powers of the trial court.[21] The U.S. Supreme Court first addressed the issue in Faretta v. California:[22]

> Of course, a State may — even over objection by the accused — appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.

422 U.S. 806, 835 n.46.

In McKaskle v. Wiggins,[23] the Court elaborated as follows:

> Accordingly, we make explicit today what is already implicit in Faretta: A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel — even over the defendant's objection — to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.

465 U.S. 168, 184.

The proper role of standby counsel was also discussed in McKaskle v. Wiggins. The question was whether the standby counsel is limited to a "seen but not heard" sort of assistance: Is counsel to participate only upon the defendant's request or may counsel directly participate in the trial, unsolicited by the defendant?

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The Court held that unsolicited participation by standby counsel does not impermissibly infringe on the defendant's right to self-representation. Two general limits on standby counsel were recognized:

(1) defendants are entitled to preserve actual control over the case they choose to present to the jury; and

(2) participation by standby counsel should not be allowed to destroy the jury's perception that defendants are representing themselves.

Specific actions which do not infringe upon the right to self-representation include:

(1) any actions taken at the specific or implied invitation of the defendant;

(2) assistance in overcoming routine procedural or evidentiary obstacles (e.g., introducing evidence or objecting to testimony);

(3) ensuring the defendant's compliance with basic rules of courtroom protocol and procedure.

McKaskle v. Wiggins, 465 U.S. 168, 183.

The Wisconsin Supreme Court elaborated upon the role of standby counsel in Contempt in State v. Lehman, 137 Wis.2d 65, 403 N.W.2d 438 (1987). The defendant Lehman had fired four attorneys appointed by the State Public Defender and the fifth was allowed to withdraw. The State Public Defender refused to appoint another attorney and the court granted Lehman's request to appear pro se. However, the trial court appointed a lawyer to serve as standby counsel. The Supreme Court clarified that "courts possess the inherent power to appoint counsel," including standby counsel, and to order the county to pay the cost. "The decision to appoint standby counsel in this case was based, as it should be, on a determination that the needs of the Trial Court and not the Defendant, would be best served by doing so." 137 Wis.2d 65, 77 [emphasis in original]. The court emphasized that "the chief purpose of the appointment of counsel in cases like the present one is to serve the interests of the trial court. . . ." 137 Wis.2d 65, 78.

The Lehman decision was reaffirmed in State v. Newton [decided sub nom. State v. Cummings, 199 Wis.2d 721, 546 N.W.2d 406 (1996)]. The court again emphasized that appointment of standby counsel is based on the needs of the trial court to help the trial proceed in an orderly fashion and is not tied to the defendant's right to counsel. 199 Wis.2d 721, 756. In both Lehman and Newton, the court expressly noted that it was not dealing with

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possible constitutional claims in a situation where a defendant who, having waived (or forfeited) counsel, made a request for standby counsel which was denied by the trial court.

V. "Hybrid" Representation

Occasionally defendants seek to conduct portions of their own defense while they are represented by counsel. For example, Wisconsin cases have involved requests that a represented defendant be allowed to make opening statements or closing arguments. It has been claimed that the right to self-representation requires that defendants be allowed to represent themselves and be represented by counsel in the same case.

The United States Supreme Court has held that the Sixth Amendment to the U.S. Constitution does not require trial courts to permit "hybrid" representation. McKaskle v. Wiggins, 465 U.S. 168, 183. The Wisconsin Supreme Court has reached the same conclusion with respect to a claim based on the Wisconsin Constitution. Moore v. State, 83 Wis.2d 285, 265 N.W.2d 540 (1978). In Moore, the trial court's refusal to allow the represented defendant to examine witnesses was upheld. Also see Robinson v. State, 100 Wis.2d 152, 301 N.W.2d 429 (1981), where the defendant was not permitted to make a closing argument in addition to the one made by counsel.[24]

A danger in allowing represented defendants partially to represent themselves is illustrated by what happened in State v. Johnson, 121 Wis.2d 237, 358 N.W.2d 824 (1984). Johnson presented his own opening statement but did not testify. The prosecutor responded in his own opening to emphasize that Johnson's statement was not testimony and not evidence. The defendant claimed on appeal that this was unfair comment on his right not to testify. The court of appeals affirmed the conviction and adopted a "partial waiver" rule for this sort of situation which allows a limited prosecutorial comment in response to the defendant's statement. But the court noted the dilemma that the situation presents to both the prosecutor and the trial judge. 121 Wis.2d 237, 245.

VI. Court Appointment of Counsel for Defendants Who Do Not Qualify Under State Public Defender Guidelines

It is increasingly common for trial courts to be confronted with defendants who do not meet the financial criteria of the Office of the State Public Defender but who cannot afford to retain private counsel. These defendants may not wish to waive counsel expressly. And their inability to obtain counsel may result in continuances where, upon returning again without counsel, defendants may find their conduct characterized as that which justifies a finding of forfeiture of counsel. There are other negative effects as well, such as reluctance by prosecutors to discuss the case with unrepresented defendants. This can result in delay

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and even in the unavailability of plea concessions or sentence recommendations that would be freely offered if counsel was present.

There is a provision for court review of the public defender's indigency determination. Under § 977.07(3), a court "may review any indigency determination upon its own motion or the motion of the defendant and shall review any indigency determination upon the motion of the district attorney or the state public defender." Review under this authority is limited to examining the public defender's application of the legislative criteria and the accompanying mathematical computations. State v. Dean, 163 Wis.2d 503, 510, 471 N.W.2d 310 (Ct. App. 1991)

Trial courts also have inherent power to appoint counsel for defendants who do not meet the criteria for appointment of counsel by the Office of the State Public Defender. In State v. Dean, 163 Wis.2d at 513, the court stated:

> The legislature cannot limit who is constitutionally entitled to an attorney. The creation of the public defender's office is not the exclusive means for assuring counsel to indigents and did not negate the inherent power of the court to appoint when the public defender declines to act. Douglas Co. v. Edwards, 137 Wis.2d 65, 77, 403 N.W.2d 438, 44 (1987). The trial court therefore is required to go beyond the public defender's determination that a defendant does not meet the legislative criteria and determine whether the "necessities of the case" and the demands of "public justice and sound policy" require appointing counsel. See Sparkman [v. State], 27 Wis.2d 92, 98, 133 N.W.2d 776, 780 (1965).

Dean held that the burden of proof lies with the defendant to convince the court that appointment of counsel is necessary despite the defendant's failure to meet the public defender's indigency criteria. The decision identified the following considerations that relate to the trial court's decision:

(1) The defendant must present evidence of his or her assets, income, liabilities and attempts to retain counsel.[25]

(2) The court is not required to conduct an independent inquiry but must ask enough questions to decide the issue. The court cannot restrict itself to the criteria mandated by the legislature in § 977.07(2) but should consider all evidence that is relevant to the defendant's present ability to retain counsel.

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(3) In deciding, the court must consider whether the defendant has sufficient assets to retain private counsel at the market rate prevailing in the community. It must disregard the public defender's established cost of retained counsel in Wis. Adm. Code sec. SPD 3.02(1).[26]

Aside from the procedurally-oriented considerations, the basic question is whether the "necessities of the case" and the "demands of public justice and sound policy" require appointment of counsel.

COMMENT

SM-30 was originally approved by the Committee in 1974 and included material now found in SM-25 (Judge's Duties at Initial Appearance) and SM-31 (Waiver of Preliminary Examination). A version of SM-30 dealing only with waiver of counsel was originally published in 1987. The 1997 revision added the sections on forfeiture of counsel and court appointment of counsel and combined material formerly found in SM-30A. This revision involved general updating and was approved by the Committee in December 2005.

Part I of this Special Material is designed to be used whenever it is necessary to accept a waiver of counsel. Depending on the situation, additional issues will also have to be dealt with. If the defendant wishes to waive counsel and enter a guilty plea, SM-30 should be followed by SM-32, Accepting A Plea Of Guilty.

Part I includes a series of questions recommended for use whenever it is necessary to accept a waiver of counsel. The record must reflect a voluntary and intelligent waiver whenever the defendant wishes to go ahead with a "critical stage" of the proceeding without representation. [The right to counsel under the Sixth Amendment to the United States Constitution applies to all critical stages of the proceedings that follow the filing of the criminal charge. See, for example, United States v. Wade, 388 U.S. 218, 87 Sup.Ct. 1926, 18 L.Ed.2d 1149 (1967); Jones v. State, 63 Wis.2d 97, 216 N.W.2d 224 (1974).] Thus, the inquiry may be necessary at the preliminary examination, the entry and acceptance of a plea, trial, or sentencing. The waiver is usually accompanied by a request that the defendant be allowed to represent himself, making additional inquiry necessary.

Part II deals with a problem referred to as forfeiture of counsel. See LaFave and Israel, Criminal Procedure, Sec. 11.3(c), West, 1984. This is intended for those situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. In State v. Newton, 199 Wis.2d 721, 757, 546 N.W.2d 406 (1996), the Wisconsin Supreme Court held that "there may be situations . . . where a circuit court must have the ability to find that a defendant has forfeited his right to counsel."

Federal cases have held that the right to counsel may be waived by a defendant who fails to retain counsel within a reasonable time when he is financially able to do so. United States ex rel. Baskerville v. Deegan, 428 F.2d 714 (2d Cir. 1970); United States v. McMann, 386 F.2d 611 (2d Cir. 1967). The Wisconsin Supreme Court has addressed this issue once, reversing a trial court's order requiring a defendant to proceed to trial despite the fact that his lawyer did not show up. In State v. Keller, 75 Wis.2d 502, 249 N.W.2d 773 (1977), the court found the record insufficient to indicate that the defendant had in fact

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knowingly waived his right to counsel and reversed the conviction. The court did not spell out what the trial court should do in a situation where the defendant has not obtained counsel but does not wish to waive the right to be represented. Related, but distinguishable, are cases involving the choice of counsel. Several decisions deal with the issue of abuse of discretion in denying a continuance when the defendant makes a late request to change counsel. See State v. Wedgeworth, 100 Wis.2d 514, 302 N.W.2d 810 (1981); Mulkovich v. State, 73 Wis.2d 464, 243 N.W.2d 198 (1976); Phifer v. State, 64 Wis.2d 24, 218 N.W.2d 354 (1974); Rahhal v. State, 52 Wis.2d 144, 187 N.W.2d 800 (1971). The court in Keller acknowledged that forcing a defendant to go to trial without counsel is drastically different from forcing him to go to trial with a competent counsel not his first choice. (See the discussion of forfeiture of counsel in Section II.)

1. Specific questions are not suggested to emphasize that trial judges should tailor the inquiry to fit the case at hand and the judge's preferences. Some or all of the questions may be eliminated altogether if a similar inquiry has already been conducted to, for example, set bail. Examples of specific questions on these topics are included in SM-32, Accepting A Plea Of Guilty. Additional questions will often be suggested by the defendant's responses. And, the Committee recommends that the questions be designed to elicit more than one-word answers from the defendant. This is especially important in the context of an inquiry into waiver of counsel.

In State v. Ruszkiewicz, 2000 WI App 125, 237 Wis.2d 441, 613 N.W.2d 893, the court found a waiver of counsel to be valid, despite the trial court not following the procedure recommended by SM-30. However, the decision noted that "SM-30 sets out suggested procedures and colloquies that trial courts should follow." Ruszkiewicz at ¶29.

2. But see note 9, below, suggesting that the best person to discuss the advantages of being represented by counsel is a lawyer.

3. A valid waiver of counsel does not require the trial court to advise the defendant of the right to have counsel appointed at county expense where he does not qualify under the State Public Defender guidelines. State v. Drexler, 2003 WI App 169, 266 Wis.2d 438, 669 N.W.2d 182. Also see the discussion in Sec. VI, this SM.

4. The areas listed may have already been explored in the inquiry into the defendant's ability to understand the proceedings. They are restated here because they reflect the four factors identified in Pickens as relevant to deciding whether the defendant "possesses the minimal competence necessary to conduct his own defense": education; literacy; fluency in English; and "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury."

5. The Committee recommends that the finding specifically refers to the four factors identified in the Pickens decision: education, literacy, fluency in English, and physical or psychological disability affecting the ability to communicate in the courtroom. Identification of more specific aspects of the competency for self-representation is difficult. As noted in the Klessig decision, the "determination must rest to a large extent upon the judgment and experience of the trial judge." 211 Wis.2d 194, 212 [quoting Pickens].

6. For appellate decisions affirming the denial of a request to proceed pro se see the following: Hamiel v. State, 92 Wis.2d 656, 285 N.W.2d 639 (1979): request was made on the morning trial was to begin and competent counsel was available; Laster v. State, 60 Wis.2d 525, 211 N.W.2d 13 (1973): request was actually to change counsel, not to proceed pro se; Browne v. State, 24 Wis.2d 491, 129 N.W.2d 175 (1964): request was to dismiss appointed counsel and defendant lacked the capacity to intelligently waive counsel.

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7. The Committee recommends that the finding specifically refers to the four factors identified in the Pickens decision: education, literacy, fluency in English, and physical or psychological disability affecting the ability to communicate in the courtroom. Identification of more specific aspects of the competency for self-representation is difficult. As noted in the Klessig decision, the "determination must rest to a large extent upon the judgment and experience of the trial judge." 211 Wis.2d 194, 212 [quoting Pickens].

8. Pickens v. State, 96 Wis.2d 549, 292 N.W.2d 601 (1980). Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), is the leading U.S. Supreme Court decision on the procedure to be used in recording a waiver of counsel. Though it was a plurality opinion, its holding is consistent with decisions of the Wisconsin Supreme Court that both preceded and followed it. In State ex rel. Drankovich v. Murphy, 248 Wis. 433, 438, 22 N.W.2d 540 (1946), the court held that the trial judge had the duty to protect the accused's right to counsel by assuring, on the record, that the accused "knew he had the right to counsel and voluntarily rejected it." In a later plea of guilty case, the court outlined the general nature of the inquiry that a trial court should make:

1. To determine the extent of the defendant's education and general comprehension.

2. To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries.

3. To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty.

4. To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused.

5. To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him.

Finally, the trial judge should be certain that the record itself reflects the fact that careful consideration was given to the foregoing propositions.

State ex rel. Burnett v. Burke, 22 Wis.2d 486, 494, 126 N.W.2d 91 (1964).

The courts have not transformed the requirements of Von Moltke and Burnett into any specific colloquy; flexibility in approach is allowed, as long as the "knowing and voluntary" nature of the decision is apparent on the record. Pickens v. State, 96 Wis.2d 549, 561-64, 292 N.W.2d 601 (1980).

9. This suggestion assumes that a staff public defender is present in court and able to talk to the defendant right away. It is premised on the Committee's conclusion that the best way for a defendant to be informed of the value of representation by counsel is to have a discussion with a lawyer. In many areas of the state, lawyers on the staff of or provided by the State Public Defender are available to speak with unrepresented defendants before the initial appearance. Rather than the judge trying to provide a lengthy explanation of the right to counsel, it is preferable simply to give the defendant a chance to discuss the matter with an attorney.

10. 96 Wis.2d 549, 292 N.W.2d 601 (1980).

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11. 199 Wis.2d 721, 757, n.18. The four steps are outlined in the dissent at 199 Wis.2d 721, 765.

12. The Sixth Amendment to the United States Constitution does not expressly recognize the right to represent oneself, but the Supreme Court has found that the right ". . . to make one's defense personally—is thus necessarily implied by the structure of the Amendment." Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

13. Article I, Section 7, of the Wisconsin Constitution explicitly recognizes the right to self-representation: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel. . . ." Cases have recognized the state constitutional right for many years. See Dietz v. State, 149 Wis. 462, 479, 136 N.W. 166 (1912). The reference to "by himself and counsel" (emphasis added) has been held not to require "hybrid" representation — pro se and by counsel — in a single case. See discussion at note 24, below.

14. Cases involving self-representation often involve defendants who are dissatisfied with retained or appointed counsel. It is important to clarify whether a defendant is seeking to dismiss or change his present lawyer or actually seeking to represent himself. See Laster v. State, 60 Wis.2d 525, 539, 211 N.W.2d 13 (1973).

15. The question of "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se?" was addressed in Hamiel v. State, 92 Wis.2d 656, 285 N.W.2d 639 (1979). The court upheld the trial court's denial of a request to proceed pro se when the request was made just as the trial was to begin. The court held that the right to proceed pro se, like the right to be represented by counsel "cannot be manipulated so as to obstruct the orderly procedure for trials or to interfere with the orderly administration of justice." 92 Wis.2d 656, 672. The factors for the trial court to consider in exercising discretion were identified:

> Where the request to proceed pro se is made on the day of trial or immediately prior thereto, the determinative question is whether the request is proffered merely to secure delay or tactical advantage. In such a situation, the trial court should determine if the request could have been made earlier, and if so, why not. If the defendant cannot show good cause as to why a demand was not made at an earlier appearance before the court, and if an adjournment would result from a granting of the defendant's self-representation request, the trial court must weigh the defendant's constitutional guarantee to a fair trial as well as the convenience of the witnesses, jurors, and the court schedule when exercising its discretion to approve or deny the request.

92 Wis.2d 656, 673.

16. 96 Wis.2d 549, 292 N.W.2d 601 (1980).

17. See section I., supra.

18. Procedures and legal standards relating to competency to stand trial are discussed in SM-50, Competency to Proceed.

19. See Standard 6-3.6, The Defendant's Election To Represent Himself or Herself At Trial, and Commentary. ABA Standards For Criminal Justice.

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20. In State v. Marquardt, 2005 WI 157, 286 Wis.2d 204, 705 N.W.2d 878, the court affirmed a trial court finding that the defendant was not competent to represent himself. The circuit court had referred to the seriousness of the charges, the complexity of the case and evidence of the defendant's mental illness. See ¶63. The supreme court concluded that "the medical and psychological opinions in this case identified a emmber of specific problems that could have prevented Marquardt from meaningfully presenting his own defense." ¶69.

21. In Contempt in State v. Lehman, 137 Wis.2d 65, 403 N.W.2d 438 (1987), the Wisconsin Supreme Court recognized that appointment of standby counsel for a pro se defendant was within the inherent power of the trial court. The court emphasized that in cases like the one before it in Lehman, the appointment of standby counsel is to serve the interests of the court — to help assure that the trial proceeds in an orderly fashion. 137 Wis.2d 65, 78.

The ABA Standards for Criminal Justice recommend the following standard for the appointment of standby counsel:

Standard 6-3.7 Standby counsel for pro se defendant

When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

22. 422 U.S. 806, 95 S.Ct. 252, 45 L.Ed.2d 562 (1975).

23. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

24. The text of the Wisconsin constitutional provision (see note 13, supra) offers some support for the argument that "hybrid representation" is required in that it refers to "the right to be heard by himself and counsel. . . ." (emphasis added). However, the argument was expressly rejected in Moore v. State, 83 Wis.2d 285, 298-300, 265 N.W.2d 540 (1978).

25. Forms have been created by the Office of Director Of State Courts to facilitate this determination. See "Petition For Appointment Of Counsel, Affidavit Of Indigency And Order," Form GF-152, 4/97.

26. In State v. Nieves-Gonzales, 2001 WI App 90, 242 Wis.2d 782, 625 N.W.2d 913, the court found that the trial court applied the federal poverty guidelines incorrectly in denying counsel to the defendant. Those guidelines should be considered, though not every defendant with income less than the guidelines is entitled to court-appointed counsel. "W]here a trial court denies a motion for court-appointed counsel after the defendant has shown that she or he has no assets and a household income well below the federal guidelines, a trial court should set forth findings explaining why it has determined the defendant can nevertheless afford counsel." Nieves-Gonzales, ¶8.

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SM-31 WAIVER OF PRELIMINARY EXAMINATION

THE FOLLOWING IS RECOMMENDED FOR USE WHEN A DEFENDANT WITHOUT COUNSEL WISHES TO WAIVE THE PRELIMINARY EXAMINATION. IT WILL ALSO BE NECESSARY TO CONDUCT A WAIVER OF COUNSEL INQUIRY, SEE SM-30.

"Since you are charged with a felony, you are entitled to a preliminary examination if you want one, or you may waive it. A preliminary examination is not a trial, but it is a step in the proceedings against you. Witnesses will be called by the State to testify against you and you have the right to cross-examine them. You will also have the right to present evidence. You are entitled to the assistance of a lawyer if you want one.

The purpose of the preliminary examination is to determine whether probable cause exists. Probable cause means facts, together with reasonable inferences from those facts, which lead a reasonable person to conclude that a felony has probably been committed and that you probably committed it.[1] If the court finds that there is probable cause to believe that you did commit a felony, you will be required to stand trial. If the court does not find probable cause, the charges will be dismissed or reduced or the state may refile."[2]

"Do you understand that?"

"Has anyone made any promise or threat to you to get you to waive the preliminary examination?"

Do you want a preliminary examination?"

IF THE DEFENDANT SAYS THAT HE OR SHE DOES NOT WANT A PRELIMINARY EXAMINATION, THE JUDGE SHOULD MAKE THE FOLLOWING FINDING OF FACT:

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"The court finds that the defendant has freely, voluntarily, and understandingly waived (his) (her) right to a preliminary examination."

AFTER THE COURT MAKES THE FINDING OF WAIVER, THE COURT SHOULD BIND THE DEFENDANT OVER FOR TRIAL.

THE COURT SHOULD SET OR REVIEW BAIL IN ACCORDANCE WITH CHAPTER 969 OF THE WISCONSIN STATUTES.

COMMENT

SM-31 was originally published in 1987; it consisted of material previously included as part of SM-30, Waiver of Counsel. This revision was approved the Committee in February 2011; it adopted a new format and made minor additions and editorial changes.

There are no Wisconsin cases dealing specifically with the adequacy of a waiver of a preliminary examination. There are cases holding that a guilty plea constitutes an effective waiver of a preliminary, though these predated the days of great concern over adequate documentation of such matters.

The primary reason why there has not been appellate litigation on this issue is probably that the strict waiver standards apply to waivers of constitutional rights. A preliminary examination is not constitutionally required, so arguably a full record of a "knowing and intelligent waiver" is not required either.

Regardless of the legal arguments that can be made, it is undoubtedly the wise practice to reflect the waiver on the record. The inquiry ought to be quite brief when the defendant is represented by counsel. But where the defendant is not represented, a description of the preliminary hearing and an inquiry into the defendant's understanding should be conducted. SM-31 is intended as a guide for this type of inquiry.

The primary case discussing the waiver of the preliminary by entering a guilty plea is State v. Strickland, 27 Wis.2d 623, 633, 135 N.W.2d 295 (1965):

> Where a defendant appears by counsel, . . . and enters a plea of guilty without requesting a preliminary hearing, a trial court has the right to assume that the preliminary hearing has been intelligently waived.

Thus, Strickland was based on the assumption that counsel would do his job properly. Strickland used that same assumption to find that the type of plea acceptance colloquy now found in SM-32 should not be required (though it was recommended). As to the guilty plea procedure, Strickland was overruled in Ernst. Unfortunately, its assumption that the lawyer would do his or her job was explicitly overruled as well.

Even Strickland would impose a duty on the trial judge in cases where the defendant appears without counsel:

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> However, where a defendant charged with a felony appears without counsel and waives counsel, . . . it is the duty of the court to advise the defendant of his right to a preliminary hearing before proceeding further. 27 Wis.2d 623, 633-34.

1. The definition of probable cause is based on the one provided in the Benchbook, section CR-5. For cases discussing probable cause in the context of the preliminary examination see: State v. Berby, 81 Wis.2d 677 (1978); State v. Beal, 40 Wis.2d 607 (1968); State v. Dunn, 117 Wis.2d 487 (1984); and, State v. Schaefer, 2008 WI 25, 308 Wis.2d 279, 746 N.W.2d 457.

2. If a felony is charged but the preliminary examination discloses that only a misdemeanor was committed, the court shall order the complaint amended to conform to the evidence. § 970.03(8).

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SM-32 ACCEPTING A PLEA OF GUILTY

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Scope

The inquiry suggested here is intended to illustrate a complete plea acceptance procedure, fully implementing the personal inquiry required by § 971.08 and Wisconsin case law.

SM-32 has been repeatedly cited with approval by the Wisconsin Supreme Court, in decisions urging that it be used by the trial courts. In a 2006 decision, the court "strongly encouraged" trial courts to follow the procedures prescribed in SM-32. State v. Brown, 2006 WI 100, ¶23, footnote 11, 293 Wis.2d 594, 716 N.W.2d 906. Also see, State v. Hampton, 2004 WI 107, ¶44, 274 Wis.2d 379, 683 N.W.2d 14; State v. Bangert, 131 Wis.2d 246, 272, 389 N.W.2d 12 (1986); State v. Minniecheske, 127 Wis.2d 234, 245-46, 378 N.W.2d 283 (1983); and, State v. Bartelt, 112 Wis.2d 467, 483-84, 334 N.W.2d 91 (1983).

The use of written plea acceptance forms has been expressly approved. State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987); State v. Brandt, 226 Wis.2d 610, 594 N.W.2d 759 (1999). But a personal inquiry of the defendant is still required, ". . . making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one." 141 Wis.2d 823, 827. The Judicial Conference has adopted CR-227, a form titled, "Plea Questionnaire/Waiver of Rights." Section 971.025(1) provides: "In all criminal actions and proceedings . . . the parties and court officials shall use the standard court forms adopted by the judicial conference under s. 758.18 . . ."

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SM-32 is divided into ten sections, each identified by a Roman numeral. The section headings are intended only to clearly identify the different parts of the plea acceptance inquiry. Directions to the judge are in all capital letters.

The suggested questions and statements to be addressed to the defendant (and, in a few instances, to defense counsel) are found in quotation marks and are numbered from 1 to 30. Their form is merely suggested by this Special Material; judges will undoubtedly want to tailor them to the case at hand and develop others of their own.

THE FOLLOWING ASSUMES THE DEFENDANT IS REPRESENTED BY COUNSEL. IF THE DEFENDANT IS NOT REPRESENTED, A VALID WAIVER OF COUNSEL MUST BE OBTAINED BEFORE ACCEPTING THE PLEA.[1]

I. Determining Compliance With Victims' Rights Legislation

THE COURT SHOULD INQUIRE OF THE PROSECUTOR:

"Have you complied with the victim notice and consultation law – § 971.095(2)?"[2]

II. Reading the Charging Document; Guilty Plea Tendered

ASSURE THAT THE DEFENDANT HAS A COPY OF THE COMPLAINT OR THE INFORMATION; IDENTIFY THE CHARGE, THE MAXIMUM TERM OF IMPRISONMENT AND THE MAXIMUM FINE, [3] APPLICABLE REPEATER STATUTES, PENALTY ENHANCERS, AND MANDATORY MINIMUM SENTENCES.[4]

THE INFORMATION OR COMPLAINT SHOULD BE READ, UNLESS THE READING IS WAIVED.[5]

THE COURT SHOULD INQUIRE PERSONALLY[6] OF THE DEFENDANT:

1. "How do you plead?"

IF THE DEFENDANT ANSWERS "NO CONTEST" OR "ALFORD," THE COURT SHOULD ADDRESS THE DEFENDANT AND DEFENSE COUNSEL AS FOLLOWS.[7]

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["A plea of no contest means that you do not contest the state's ability to prove the facts necessary to constitute the crime."]

["An Alford plea is a guilty plea accompanied by a claim of innocence."]

["Do you understand that for the purposes of this proceeding, (a plea of no contest) (an Alford plea) will have the same effect as a plea of guilty? And that, if accepted, it will result in a conviction that carries the same character and force as a conviction resulting from a plea of guilty?"]

["Counsel, have you discussed the consequences of the plea with the defendant and do you believe the defendant understands them?"]

CONTINUE WITH THE FOLLOWING IN ALL CASES.

2. "Before your plea is entered and accepted by the court, the court will ask you certain questions to determine whether or not your plea should be entered and accepted. If you have any trouble understanding the questions, take all the time you need to confer with your attorney."

3. **"If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."**[8]

ADD THE FOLLOWING IN ALL FELONY CASES.

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4. "If you are convicted of a felony, you will not be allowed to possess a firearm. Section 941.29 makes it a crime punishable by imprisonment for up to ten years or a fine of up to $25,000, or both, for a person convicted of a felony to possess a firearm."[9]

5. "If you are convicted of a felony, you may not vote in any election until your civil rights are restored."[10]

CONTINUE WITH THE FOLLOWING IN ALL CASES.

6. "If you are convicted, you may be required to make full or partial restitution to any victim of the crime."[11]

III. Determining the Defendant's Ability to Understand the Proceedings

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE PROCEEDINGS BEFORE ACCEPTING THE PLEA. THE COURT SHOULD MAKE PERSONAL INQUIRY OF THE DEFENDANT INTO AREAS SUCH AS EDUCATION, WORK EXPERIENCE, HISTORY OF MENTAL ILLNESS, RECENT DRUG OR ALCOHOL USE, ETC. THE FOLLOWING ARE EXAMPLES OF QUESTIONS[12] THAT SHOULD BE ASKED. ANSWERS INDICATING THE NEED FOR MORE INFORMATION SHOULD BE PURSUED.

7. "How old are you?"

8. "How far did you go in school?"

9. "Do you have a job?"

IF THE ANSWER IS YES:

"Where do you work?"

"How long have you worked there?"

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IF THE ANSWER IS NO:

"When were you last employed?"

"What are you trained to do?"

10. "Have you received treatment for mental or emotional problems?"

11. "Have you had any alcohol or other intoxicants today?"

"Have you taken any medication or drugs today?"

12. "Are you having any difficulty understanding the court?"

"Are you having any difficulty understanding your attorney?"

13. "Is there anything you do not understand about what has happened in this case so far?"

IV. Establishing the Voluntariness of the Plea

ESTABLISHING VOLUNTARINESS INVOLVES TWO AREAS OF INQUIRY:

1. PLEA AGREEMENT; AND

2. THREATS OR COERCION OR PROMISES OUTSIDE OF A PLEA AGREEMENT.

14. "Is there a plea agreement in this case?"

IF THERE IS A PLEA AGREEMENT,[13] PUT IT ON THE RECORD AND ESTABLISH THE DEFENDANT'S UNDERSTANDING OF THE AGREEMENT.

15. "Do you understand the plea agreement?"

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16. "Do you understand that the court is not bound by a sentencing recommendation or other terms of the plea agreement?"[14]

17. "Do you understand that upon your plea of guilty, the court may impose the maximum penalty, in spite of any agreement?"[15]

IF THE PLEA AGREEMENT INVOLVES READ-INS, ADD THE FOLLOWING:[16]

18. Do you understand that if any charges are read-in as part of a plea agreement they have the following effects:

    • Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.

    • Restitution – you may be required to pay restitution on any read-in charges.

    • Future prosecution – the State may not prosecute you for any read-in charges.

IF THE PLEA AGREEMENT CALLS FOR PROBATION, ADD THE FOLLOWING:[17]

19. "Do you understand that if you are placed on probation and if you later violate a condition of probation, that your probation may be revoked and you may be required to serve a sentence in jail or prison?"

    CONTINUE WITH THE FOLLOWING IN ALL CASES:

20. "Has anyone else made any promise or threat to you[18] (aside from the plea agreement) to get you to plead guilty to this charge?"

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V. Determining the Defendant's Understanding of the Crime Charged

21. "By pleading guilty, you are admitting that you committed all the elements of the crime of _____, which are as follows:"

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE CHARGE TO WHICH THE GUILTY PLEA IS BEING ENTERED. ONE WAY TO ACHIEVE THIS IS TO SUMMARIZE THE ELEMENTS OF THE CRIME CHARGED, RELATING THEM TO THE FACTS OF THE CASE.[19] REFERRING TO THE UNIFORM INSTRUCTION FOR THE OFFENSE WILL BE HELPFUL IN IDENTIFYING THE ELEMENTS. ATTACHING A COPY OF THE APPLICABLE INSTRUCTION TO THE PLEA QUESTIONNAIRE IS RECOMMENDED. THE COURT SHOULD INQUIRE OF DEFENSE COUNSEL REGARDING ANY SPECIAL ISSUES[20] OR PROBLEMS THAT SHOULD BE EXPLAINED TO THE DEFENDANT.

22. "Do you understand that you are admitting that you committed each of these elements?"[21]

FOR NO CONTEST PLEAS, SUBSTITUTE THE FOLLOWING.[22]

["Do you understand that your plea does not contest that the state can prove each of these elements?"]

FOR ALFORD PLEAS, SUBSTITUTE THE FOLLOWING.

["Do you understand that these are the elements the state would have to prove if you went to trial?

"And do you understand that despite your claim of innocence, if your plea is accepted the court will find you guilty, because strong evidence of guilt will have been established?"]

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VI. Waiver of Constitutional Rights[23]

23. "By pleading (guilty you admit that you committed the crime) (no contest you do not contest that you committed the crime) and, thus, you relieve the state of proving at a trial that you committed that crime, and you also waive – that is, you give up – important constitutional rights.

IF AN ALFORD PLEA IS INVOLVED, SEE SM-32A NO CONTEST AND ALFORD PLEAS.[24]

"You give up your right to have the state prove that you committed each element of the crime. The state must convince each member of the jury beyond a reasonable doubt that you committed the crime. Do you understand that?

"You give up your right not to incriminate yourself, which means, you have a right not to admit to a crime, not to say anything that will subject you to a criminal penalty. If the court accepts your plea, you will be convicted, and the court can impose sentence against you. Do you understand that?

"You give up the right to confront your accusers, which means you have the right to face the witnesses against you, to hear their sworn testimony against you, and to cross-examine them by asking them questions to test the truth and accuracy of their testimony. If the court accepts your plea, you give up your right to confront your accusers. Do you understand that?

"You give up the right to present evidence in your own behalf and to require witnesses to come to court and testify for you. Do you understand that?

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"Knowing that if the court accepts your plea, you give up your constitutional right to a trial by jury, your constitutional right not to incriminate yourself, and your constitutional right to confront the witnesses against you and to subpoena witnesses, do you still wish to plead (guilty) (no contest)?"

VII. Inquiry of Counsel and Defendant

THE FOLLOWING QUESTIONS SHOULD BE DIRECTED TO DEFENSE COUNSEL.

24. "Have you had sufficient opportunity to thoroughly discuss this case and the plea decision with the defendant?"

25. "Are you fully satisfied that the defendant is making (his) (her) plea of guilty freely, voluntarily, and intelligently?"

26. "Are you satisfied that the defendant understands the nature of the charge(s), the elements thereof, and the effects of (his) (her) plea?"

27. "And, are you satisfied the defendant is knowingly and intelligently waiving (his) (her) constitutional rights?"

ADD THE FOLLOWING IF A REPEATER ALLEGATION IS INVOLVED.

[28. "And, are you satisfied that the defendant understands the enhanced penalty that can be imposed if the court accepts the plea(s) of guilty as a repeater?"]

THE FOLLOWING QUESTIONS SHOULD BE DIRECTED TO DEFENDANT.

29. "Have you thoroughly discussed this case and the plea decision with your lawyer?"

30. "Are you satisfied with the representation you have received from your lawyer?"

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VIII. Entering the Plea

IF, BASED ON THE ABOVE INQUIRY, THE COURT IS SATISFIED THAT THE PLEA SHOULD BE ENTERED, THE COURT SHOULD STATE:[25]

"The clerk is directed to enter the plea in the record. The court does not thereby accept the plea, but the court defers acceptance of the plea and will now hear facts to determine whether the court should accept the plea of guilty."

IX. Establishing a Factual Basis for the Plea

IT IS REQUIRED THAT THE COURT MAKE A RECORD SHOWING THAT THERE IS A FACTUAL BASIS FOR THE DEFENDANT'S PLEA.[26] THE TRIAL JUDGE MUST DETERMINE THAT A FACTUAL BASIS FOR THE PLEA EXISTS BY MAKING "SUCH AN INQUIRY AS SATISFIES [THE COURT] THAT THE DEFENDANT IN FACT COMMITTED THE CRIME CHARGED." WIS. STAT. § 971.08(1)(b).[27]

IF THE CASE INVOLVES AN ALFORD PLEA, THE COURT MUST MAKE A FINDING THAT THERE IS "STRONG EVIDENCE OF GUILT."[28]

THE PRECISE METHOD BY WHICH THIS DUTY IS MET HAS BEEN LEFT TO THE DISCRETION OF THE TRIAL COURTS.[29] IT IS NOT REQUIRED THAT THE EVIDENCE SUBMITTED AS A BASIS FOR THE PLEA BE ADMISSIBLE AT A TRIAL OR THAT IT BE SUFFICIENT TO CONVICT BEYOND A REASONABLE DOUBT.[30]

THE REQUIRED INFORMATION MAY BE ESTABLISHED IN A VARIETY OF WAYS, AND THE TRIAL COURT MAY ADOPT DIFFERENT PROCEDURES, DEPENDING ON THE SERIOUSNESS OF THE CHARGE. IT IS COMMON PRACTICE TO ASK THE PROSECUTOR TO ESTABLISH THE FACTUAL BASIS FOR THE PLEA. ACCEPTED METHODS INCLUDE:

(1) REFERRING TO THE CRIMINAL COMPLAINT;

(2) CONSIDERING TRANSCRIPTS OF THE PRELIMINARY EXAMINATION[31] OR HEARINGS ON PRETRIAL MOTIONS;

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(3) ALLOWING THE PROSECUTOR TO DESCRIBE THE FACTS;

(4) REFERRING TO POLICE REPORTS[32] OR STATEMENTS OF THE DEFENDANT;

(5) RECEIVING TESTIMONY FROM POLICE OFFICERS,[33] VICTIMS, OR OTHER WITNESSES;[34] AND

(6) TAKING JUDICIAL NOTICE OF COURT RECORDS IN OTHER CASES (e.g., TRIAL OF A CODEFENDANT).

(7) ALLOCUTION BY THE DEFENDANT.

IN ADDITION TO THE ABOVE-DESCRIBED METHODS, SOME COURTS ADVOCATE THE USE OF A FULLY DESCRIPTIVE STIPULATION, OFTEN IN CONNECTION WITH A WRITTEN GUILTY PLEA FORM, WHICH IS SIGNED BY THE DEFENDANT, DEFENSE COUNSEL, AND THE PROSECUTOR AND DISCLOSES THE CHARGE, ITS CONSEQUENCES, THE RIGHTS WAIVED BY A GUILTY PLEA, THE FACTS SUPPORTING THE PLEA, AND ANY PLEA BARGAIN THAT HAS BEEN NEGOTIATED.[35]

THE CASE MAY BE ADJOURNED BY THE COURT FOR THE PURPOSE OF PREPARING FOR ANY OF THE METHODS OF ESTABLISHING THE FACTUAL BASIS FOR THE PLEA.

IF THE PLEA IS BEING ENTERED TO A REPEATER ALLEGATION, ADD THE FOLLOWING QUESTION.[36]

31. "Were you convicted of (name offense) on (date)?"

FOLLOWING THE OFFERING OF THE FACTUAL BASIS, DEFENSE COUNSEL SHOULD BE ASKED:

32. "From your own investigation, are you satisfied that there is a factual basis for the plea?"

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X. Accepting the Plea and Pronouncing Judgment

IF THE COURT IS SATISFIED FROM THE SHOWING PRESENTED BY THE STATE THAT A FACTUAL BASIS EXISTS FOR THE DEFENDANT'S PLEA TO THE OFFENSE TO WHICH THE DEFENDANT PLEADS (OR TO A MORE SERIOUS OFFENSE),[37] THE COURT SHOULD MAKE FINDINGS OF FACT, ON THE RECORD, SUBSTANTIALLY AS FOLLOWS:[38]

"The court finds that the defendant understands the proceedings and that the plea of guilty is freely, voluntarily, and intelligently made. The court finds that the defendant understands the constitutional rights that are waived by a guilty plea and that the defendant freely and voluntarily waives those rights."

"The court finds from the record that a factual basis exists for the plea and that the defendant has committed the crime charged."

SUBSTITUTE THE FOLLOWING IF THE CASE INVOLVES AN ALFORD PLEA.

["The court finds from the record that a factual basis exists for the plea, that there is strong evidence of guilt, and that the defendant has committed the crime charged."]

CONTINUE WITH THE FOLLOWING IN ALL CASES.[39]

"The court accepts the plea and finds the defendant guilty."

THE COURT SHOULD NOW STATE UPON THE RECORD:

"Upon the court's finding of guilty, it is adjudged that the defendant is convicted of the crime of _____ in violation of § _____, Wisconsin Criminal Code."

THE COURT SHOULD NOW DECIDE WHETHER A PRESENTENCE INVESTIGATION SHOULD BE ORDERED AND A DATE SHOULD BE SET FOR SENTENCING.

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COMMENT

SM-32 was originally published in 1966 as "SM-30." It was revised and renumbered "SM-32" in 1974 and revised again in 1980, 1985, 1992, 1994, 1995, and 2007. The 2007 revision involved the addition of Section I., revision of question 15, and extensive updating of the Comment. This revision was approved by the Committee in June 2019; it involved non-substantive changes to the text and updating the Comment and footnotes.

The inquiry suggested here is intended to illustrate a complete plea acceptance procedure, fully implementing the personal inquiry required by § 971.08 and Wisconsin case law. It is expected that individual judges will use it only as a general guide, choosing those parts that seem helpful and modifying others as appropriate to local practice and the case at hand.

The 1980 version of SM-32 was cited with approval by the Wisconsin Supreme Court in State v. Bartelt, 112 Wis.2d 467, 334 N.W.2d 91 (1983). The court "strongly advise[d] trial judges to give substantial heed to the explicit directions contained therein when accepting a plea of guilty or no contest." 112 Wis.2d 467, 484 n.3. The 1985 version was cited with approval in State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986). See discussion below. The 1995 version was cited with approval and its use urged in State v. Hampton, 2004 WI 107, ¶44, 274 Wis.2d 379, 683 N.W.2d 14 and State v. Brown, 2006 WI 100, ¶23, note 11, 293 Wis.2d 594, 716 N.W.2d 906.

Court-Required Plea Acceptance Procedures

The first Wisconsin decision to identify significant requirements for guilty plea acceptance was Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969). Ernst held that the then-existing procedures of Rule 11 of the Federal Rules of Criminal Procedure were required in state courts as a matter of federal constitutional law under the decision in Boykin v. Alabama, 395 U.S. 238 (1969). It is now clear that Rule 11 procedures are not constitutionally required in state practice. State v. Bangert, supra, at 259-60. Even though application of Federal Rule 11is not required and though it has been extensively changed since 1969, its extensive commentary and the federal cases interpreting it may be helpful when questions about Wisconsin guilty plea practice arise.

State v. Bangert, supra, reaffirmed the requirement that a full personal inquiry be conducted in accepting a plea, including an inquiry into the defendant's understanding of the elements and their relation to the facts of the case. The rule of State v. Cecchini, 124 Wis.2d 200, 368 N.W.2d 830 (1985), that a plea can automatically be withdrawn if there is a defect in the acceptance colloquy, was overruled. In its place, Bangert created a new procedure to replace automatic withdrawal of a plea where the record of plea acceptance is defective:

> (1) the defendant must make a prima facie showing that required plea acceptance procedures were not complied with and must allege that the plea was not understandingly made;
>
> (2) if that showing is made, the burden shifts to the State to show that the plea was knowingly, voluntarily and intelligently entered. The state may go outside the record of the plea colloquy and use any evidence relevant to the issue.

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The Bangert court also stated:

> Henceforth, we will also require as a function of our supervisory powers that state courts at the plea hearing follow the provisions set forth in Wis JI-Criminal SM-32 (1985), Part V, Waiver of Constitutional Rights . . .
>
> Although Bangert questions only the adequacy of the nature of the charge and constitutional waiver colloquy of the plea hearing, we urge trial courts to closely follow all of the procedures for the taking of a guilty or no contest plea as set forth at Wis JI-Criminal SM-32 (1985). We have previously expressed this recommendation, and believe that careful adherence to SM-32 will satisfy the constitutional standard of a voluntary and knowing plea, as well as the Ernst requirements, the procedure of Section 971.08, Stats., and the other mandatory procedures described herein.
> 131 Wis.2d 246, 22.
>
> . . . .
>
> We reiterate that the duty to comply with the plea hearing procedures falls squarely on the trial judge. We understand that most trial judges are under considerable calendar constraints, but it is of paramount importance that judges devote the time necessary to ensure that a plea meets the constitutional standard. The plea hearing colloquy must not be reduced to a perfunctory exchange. It demands the trial court's "utmost solicitude." Such solicitude will serve to forestall postconviction motions, which have an even more detrimental effect on a trial court's time limitations than do properly conducted plea hearings. Intentional failure to follow such mandate could be grounds for judicial discipline.
> 131 Wis.2d 246, 278-79.

In State v. Pegeese, 2019 WI 60, — Wis.2d —, 928 N.W.2d 590, the Wisconsin Supreme Court restated the list of duties a court has at a plea acceptance proceeding:

> ¶23 This court has recognized that circuit courts have a number of duties at a plea hearing to ensure that a defendant's guilty or no contest plea is knowing, intelligent, and voluntary, which include conducting a colloquy to:
>
> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;

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(9) Notify the defendant of the direct consequences of his plea; and

(10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

SM-32 covers all of the above, although not in the same order.

Addressing The Defendant Personally

Requirements at several stages of the plea acceptance procedure refer to the trial court "personally" providing advice or making inquiry. In State v. Hampton, supra, the court discussed what "personally" requires in the context of determining the defendant's understanding that the judge is not bound by sentencing recommendations in the plea agreement. The court held that the judge's duty "does not require that the court all the essential information personally, although personal explanation by the court strikes us as the most logical, consistent, and efficient way of delivering the information." 2004 WI 107, ¶43 (emphasis in original). See note 5, below.

Relying On A Plea Questionnaire/Waiver Of Rights Form

In State v. Hoppe, 2009 WI 41, 317Wis.2d 161,765 N.W.2d 794, the court held that the plea colloquy was insufficient but that other evidence showed the plea was voluntarily and understandingly made. The primary issue was the permissible extent of reliance on a signed "Plea Questionnaire/Waiver of Rights" form:

> ¶ 30. A circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties. . . .
>
> ¶ 31. A circuit court may not, however, rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy. . . [T]he plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in [State v.] Brown. . . .
>
> ¶ 32. . . . A complete Form can therefore be a very useful instrument to help ensure a knowing, intelligent, and voluntary plea. The plea colloquy cannot, however, be reduced to determining whether the defendant has read and filled out the Form. Although we do not require a circuit court to follow inflexible guidelines when conducting a plea hearing, the Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant.

In State v. Pegeese, 2019 WI 60, — Wis.2d —, 928 N.W.2d 590, the Wisconsin Supreme Court reaffirmed the holding in Hoppe:

> ¶36 A plea questionnaire is indeed a useful tool to supplement a plea colloquy, but it alone does not replace a plea colloquy during which the circuit court must determine whether a plea is being made knowingly, intelligently, and voluntarily.
>
> . . . . .
>
> ¶39 We therefore reaffirm that the circuit court may utilize a waiver of rights form such as Form CR-227, but the use of that form does not otherwise eliminate the circuit court's plea colloquy

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duties. While the circuit court must exercise great care when conducting a plea colloquy so as to best ensure that a defendant is knowingly, intelligently, and voluntarily entering a plea, a formalistic recitation of the constitutional rights being waived is not required.

The Defendant's Right To Be Present

". . . § 971.04(1)(g) provides a criminal defendant the statutory right to be in the same courtroom as the presiding judge when a plea hearing is held, if the court accepts the plea and pronounces judgment. However, we also conclude that this statutory right may be waived ..." State v. Soto, 2012 WI 93, 343Wis.2d 43, ¶2, 817 N.W.2d 848. The court also described the type of inquiry that should accompany the use of videoconferencing for a hearing at which "presence" is required. 343Wis.2d 43, ¶46. See SM-18 Defendant's Consent To Proceed By Videoconference – Waiver Of Right To Be Present Under § 971.04.

Joining A Guilty Plea With A Plea Of Not Guilty By Reason Of Mental Disease Or Defect

The Committee recommends that the full guilty plea acceptance procedure should be followed in cases where a defendant joins a plea of guilty with a plea of not guilty by reason of mental disease or defect [NGI]. The cases should be treated as involving two pleas. First, there is a plea of guilty to the offense(s) charged, with the full plea acceptance procedures used. This is consistent with State v. Shegrud, 131 Wis.2d 133, 389 N.W.2d 7 (1986) – holding that an NGI plea is like a no contest plea and that Bangert and § 971.08 procedures should be followed – and State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986). Also see, State v. Vander Linden, 141 Wis.2d 155, 414 N.W.2d 72 (Ct. App. 1987), where the recommended procedure was referred to with apparent approval. Second, there is the plea of "not guilty by reason of mental disease or defect." The Committee recommends that the colloquy reflect that defendants understand the nature of this plea, including the maximum term of commitment to which they are exposed. See § 971.17(1).

In State v. Fugere, 2019 WI 33, 386 Wis.2d 76, 924 N.W.2d 469, the Wisconsin Supreme Court held that trial courts are not required to advise defendants of the maximum term of commitment if they are found not guilty by reason of mental disease or defect and declined to exercise its supervisory authority to require courts to do so.

> ¶2. We conclude that a circuit court is not required to inform an NGI defendant of the maximum possible term of civil commitment at the guilt phase: (1) because a defendant who prevails at the responsibility phase of the NGI proceeding has proven an affirmative defense in a civil proceeding, avoiding incarceration, and is not waiving any constitutional rights by so proceeding in that defense; and (2) because an NGI commitment is not punishment, but rather a collateral consequence to one who successfully mounts an NGI defense to criminal charges. We therefore decline to exercise our superintending and administrative authority to require circuit courts to advise NGI defendants of the maximum period of civil commitment.

In State v. Francis, 2005 WI App 161, 285 Wis.2d 451, 701 N.W.2d 632, the court of appeals held that when accepting a guilty plea from a defendant who had originally entered an insanity plea, the court was not required to address the defendant personally with respect to the withdrawal of the insanity plea. However, the court noted:

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> . . . we believe it nonetheless advisable for the trial court to engage in personal colloquy for a least two reasons: First, it helps satisfy the court that the defendant is aware and alert as to what is going on. Second, the record is protected from later ineffective assistance of counsel claims where a convicted defendant might assert that counsel never discussed the NGI withdrawal. 285 Wis.2d 451, 467, footnote 5.

The Wisconsin Supreme Court has reaffirmed that it is good practice for a plea colloquy to address NGI plea withdrawal. State v. Burton, 2013 WI 61, 349 Wis.2d 1, 832 N.W.2d 611.

1. SM 30 Waiver And Forfeiture Of Counsel, etc., provides a suggested inquiry and findings for the waiver of the right to counsel.

2. **Consultation with victims.** This question is intended to comply with the requirements of § 971.08(1)(d), which reads as follows: "(d) Inquire of the district attorney whether he or she has complied with s. 971.095(2)."

Section 971.095 is titled: "Consultation with and notices to victim." Subsection (2) imposes a duty on the district attorney to offer all victims who have requested it "an opportunity to confer with the district attorney concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations."

The Committee concluded that this inquiry should be made at the beginning of the plea acceptance hearing. If the prosecutor has not complied with § 971.095(2), that fact should be disclosed as early as possible. If the prosecutor has complied as required, establishing that fact at the beginning of the proceeding should satisfy not only the obligation set forth in § 971.08(1)(d) but also the obligation in § 971.315 to make the same inquiry if the plea agreement calls for dismissal of charges:

> **971.315 Inquiry upon dismissal.** Before a court dismisses a criminal charge against a person, the court shall inquire of the district attorney whether he or she has complied with s. 971.095(2).

See footnote 15 regarding plea agreements calling for dismissal of charges.

3. **Identifying the maximum penalty.** The maximum penalty must be explained at the time the plea is accepted, even if it has been explained at earlier stages of the proceedings. State v. Bartelt, 112 Wis.2d 467, 334 N.W.2d 91 (1983). A complete description of the charge and the penalty may be done in the following manner:

> "Do you understand that you are charged with burglary?"
> "And do you understand that the maximum penalty for burglary is 12 ½ years of imprisonment, composed of 7 ½ years of initial confinement and 5 years extended supervision, and a fine of $25,000?"

In State v. Sutton, 2006 WI App 118, 294 Wis.2d 330, 718 N.W.2d 146, the court held that advice is not required about the maximum term of initial confinement on a bifurcated sentence; advice on the maximum term of imprisonment is sufficient.

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In State v. Douglas, 2018 WI App 12, 380 Wis.2d 389, 908 N.W.2d 466, plea withdrawal was ordered because the trial court and counsel provided erroneous information on the maximum sentence.

When the defendant entered his guilty plea in State v. Finley, 2016 WI 63, 370 Wis.2d 402, 882 N.W.2d 761, he was erroneously informed (both by the circuit court and in the plea questionnaire/waiver of rights form) that his maximum exposure was nineteen and one half years. Finley was sentenced to the actual maximum of twenty-three and one half years imprisonment, and he later sought to withdraw his plea. The court of appeals sent the case back and the trial court reduced the sentence to nineteen and one half years. Finley went back to the court of appeals; the court ordered that he be allowed to withdraw his plea. The supreme court affirmed:

> ¶ 95 . . . Finley is entitled to withdraw his plea: The circuit court misinformed Finley of the potential punishment he faced if convicted, information the circuit court was required to give the defendant; and the State failed to prove that when Finley entered his plea he knew the potential punishment he faced if convicted.

The decision included a "Glossary" of sentencing terms apparently intended to encourage uniformity in conducting the plea colloquy. Section 971.08 requires advising on the "potential punishment," which according to the Glossary, is the same as the maximum statutory penalty [including any penalty enhancements].

When the defendant entered his guilty plea in State v. Cross, 2010 WI 70, 326 Wis.2d 492, 786 N.W.2d 464, he, his lawyer, and the trial court all thought that the applicable maximum imprisonment he faced was 40 years. In fact, the correct maximum was 30 years imprisonment – 20 confinement and 10 ES. He was originally sentenced to 25 years confinement with 15 years ES. He moved to withdraw his plea. The trial court denied the motion but reduced the sentence to 20 years confinement and 10 years ES. The Wisconsin Supreme Court affirmed:

> ¶ 4 We hold that where a defendant is told that he faces a maximum possible sentence that is higher, but not substantially higher, than that authorized by law, the circuit court has not violated the plea colloquy requirements outlined in Wis. Stat. § 971.08 and our Bangert line of cases. In other words, where a defendant pleads guilty with the understanding that he faces a higher, but not substantially higher, sentence than the law allows, the circuit court has still fulfilled its duty to inform the defendant of the range of punishments. Therefore, the defendant is not entitled to an evidentiary hearing, and plea withdrawal remains in the discretion of the circuit court and will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice.

The decision overrules State v. Harden, 2005 WI App 252, 287 Wis.2d 871, 707 N.W.2d 173 and withdraws language in State v. Quiroz, 2002 WI App 52, ¶16, 251 Wis.2d 245, 641 N.W.2d 715, which held the defendant was not required to show he would have pled differently if he had known the correct maximum.

All applicable penalty enhancers should be included in the description of the maximum penalty, such as repeater allegations under § 939.62, the increased penalty for committing a crime while armed under § 939.63, etc. The previous versions of this Special Material recommended that if conviction would require that a consecutive sentence be imposed, that fact should also be disclosed. 2001 Wisconsin Act 109

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repealed all mandatory consecutive sentence provisions except one: § 946.43(2m)(b) relating to assaults by prisoners.

A trial court in accepting a guilty plea is not required to specifically inform the defendant that the crime is a felony or misdemeanor because this is not part of the "nature of the charge." The court noted that one way to describe "the nature of the charge" is to read from the appropriate jury instructions, which typically do not include the word "felony" or "misdemeanor." State v. Robles, 2013 WI App 76, 348 Wis.2d 325, 833 N.W.2d 184.

"Direct" and "Collateral" Consequences

The general rule is that advice on "direct" but not "collateral" consequences of conviction is required at the time a plea is accepted. A "direct consequence" is "one that has a definite, immediate, and largely automatic effect on the range of defendant's punishment." State v. Bollig, 2000 WI 6, ¶16, 232 Wis.2d 561, 605 N.W.2d 199. "Collateral consequences are indirect and do not flow from the conviction." State v. Byrge, 2000 WI 101, ¶61, 237 Wis. 2d 197, 614 N.W.2d 477. The following have been found to be "collateral consequences":

- mandatory DNA surcharge; applying the "intents/effects" test, the surcharge was not enacted with punitive intent and did not have a punitive effect. State v. Williams, 2018 WI 59, 381 Wis.2d 61, 912 N.W. 2d 373. Also see, State v. Frieboth, 2018 WI App 46, 383 Wis.2d 733, 916 N.W. 2d 643.

- requirement to register as a sex offender. Bollig, supra. [However, the court found that lack of knowledge of the registration requirement was a fair and just reason for a motion to withdraw a plea prior to sentencing.] Also see, State v. [Charles] Brown, 2004 WI App 179, 276 Wis.2d 559, 687 N.W.2d 543, where plea withdrawal was allowed because misinformation regarding sex offender registration went to the heart of the agreement.

- the possible revocation of probation for a sex offender who entered an Alford plea and therefore may not make the admission of guilt required for participation in treatment programs. State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 579 N.W.2d 698 (1998).

- potential commitment as a "sexually violent person" under Chapter 980. State v. Myers, 199 Wis.2d 391, 544 N.W.2d 609. [But see, State v. Nelson, 2005 WI App 113, 282 Wis.2d 502, 701 N.W.2d 32: the defendant's lack of knowledge of the possible Chapter 980 commitment was a fair and just reason for a motion to withdraw a plea prior to sentencing. Also see, State v. [Charles] Brown, 2004 WI App 179, 276 Wis.2d 559, 687 N.W.2d 543, where plea withdrawal was allowed because misinformation regarding a possible Chapter 980 commitment went to the heart of the agreement.]

- lifetime GPS monitoring is not "punishment," and, therefore, not a direct consequence that Muldrow had to be informed of prior to his plea. State v. Muldrow, 2018 WI 52, 381 Wis.2d 492, 912 N.W.2d 74.

- possible transfer to an out-of-state prison. State v. Parker, 2001 WI App 111, 244 Wis.2d 145, 629 N.W.2d 77.

- ineligibility for federal health care benefits under 42 USC 1320. State v. Merten, 2003 WI App 171, 266 Wis.2d 588, 668 N.W.2d 750.

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- federal firearms restriction for those convicted of misdemeanor offenses involving domestic violence. State v. Kosina, 226 Wis.2d 482, 595 N.W.2d 464 (1999).

- deportation issues based on the defendant's own misunderstanding of his status [where the court gave the required advice]. State v. Rodriguez, 221Wis.2d 487, 585 N.W.2d 701 (1998).

- unavailability of parole and good time under Truth In Sentencing. State v. Plank, 2005 WI App 109, 282 Wis.2d 520, 699 N.W.2d 235.

Even though advice on matters in the list above is not directly required, the Committee recommends that obvious and serious collateral consequences of the guilty plea should be disclosed. The most common is probably the possible revocation of probation, parole, or extended supervision. Also see footnote 9, below, regarding the required advice on the prohibition on possession of a firearm by a convicted felon.

Care should be taken to assure that the defendant understands what the maximum statutory penalty is, as distinguished from the sentence likely to be imposed, the date of parole eligibility, the likely date of parole release, or the mandatory release date on the sentence. Confusion about parole eligibility, for example, is sometimes claimed as a basis for withdrawing a plea, usually without success. See State v. Birts, 68 Wis.2d 389, 228 N.W.2d 351 (1975), which held that trial courts should not attempt to describe parole consequences as a part of the plea acceptance procedures.

In State v. Byrge, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477, the court recognized a different rule where a court exercises its authority to determine parole eligibility for life sentences under s. 973.014 under the pre-Truth In Sentencing system. "In this circumstance, parole eligibility is a direct consequence of the plea." 2000 WI 101, ¶4. Thus, "in the narrow circumstance in which a circuit court has statutory authority under s. 973.014(2) to fix the parole eligibility date, the circuit court is obligated to provide the defendant with parole eligibility information before accepting the plea." 2000 WI 101, ¶4.

4. **Repeater statutes; penalty enhancers; mandatory minimums**

Repeater statutes, penalty enhancers, and related provisions were reduced in number by 2001 Wisconsin Act 109. The following remain in force:

- § 939.615 Lifetime supervision of serious sex offenders. [See Wis JI Criminal 980.]

- § 939.616 Mandatory minimum sentence for certain child sex offenses. [First created as § 939.617 by 2005 Wisconsin Act 430; changed to § 939.616 by the Revisor when 2005 Wisconsin Act 433 created another § 939.617.] Requires a mandatory minimum sentence for certain violations of § 948.02(1) and § 948.025(1).

- § 939.617 Minimum sentence for certain child sex offenses: creates presumptive minimum sentences for violation of certain child sex offenses that are not sexual assaults: § 948.05, § 948.075, and § 948.12. Created by 2005 Wisconsin Act 433.

- § 939.618 Mandatory minimum sentence for repeat serious sex crimes: provides increased penalties for persons with prior convictions under § 940.225(1) or (2). If the prior and the current conviction are for violating § 940.225(1) the maximum term of imprisonment is life without parole or extended

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supervision. In other situations covered by the statute, there is a mandatory minimum sentence of 3 years and 6 months for the second violation. [This is former § 939.623, renumbered, retitled, and revised by 2005 Wisconsin Act 433.]

- § 939.619 Mandatory minimum sentence for repeat serious violent crimes: provides a mandatory minimum sentence of 3 years and 6 months for violation of §§ 940.03 or 940.05 if there is a prior conviction for those crimes or a crime punishable by life imprisonment. [This is former § 939.624, renumbered and retitled by 2005 Wisconsin Act 433.]

- § 939.6195 Mandatory minimum sentence for repeat firearm crimes: requires that the term of confinement for a bifurcated sentence be at least 4 years.

- § 939.62 Increased penalty for habitual criminality: the regular "repeater" provisions are in subs. (1) and (2).

- § 939.62(2m): mandatory sentence of life without parole for a "persistent repeater." This applies to "serious child sex offenses" ("Two Strikes") and to "serious felonies" ("Three Strikes").

- § 939.621 Increased penalty for certain domestic abuse offenses: provides a penalty increase of up to 2 years for certain domestic abuse offenses. [See Wis JI Criminal 983 and 984].

- § 939.63 Penalties; use of a dangerous weapon: provides for increases in the maximum sentence if a person commits a crime while possessing, using, or threatening to use a dangerous weapon. [See Wis JI-Criminal 990].

- § 939.632 Penalties; violent crime in a school zone: provides a 5 year penalty increase for certain "violent crimes" that are felonies and a 3 month penalty increase for certain "violent crimes" that are misdemeanors. [See Wis JI Criminal 992.]

- § 939.635 Increased penalty for certain crimes against children committed by a child care provider: provides for a 5-year increase in the maximum penalty for specified crimes against a child. [See Wis JI-Criminal 2115].

- § 939.645 Penalties; crimes committed against certain people or property: this is the so-called Hate Crimes Law. It provides a 5 year penalty increase for felonies; it increases the maximum sentence to two years for Class A misdemeanors; and, it increases the maximum sentence to one year in jail for misdemeanors other than a Class A misdemeanor. [See Wis JI-Criminal 996 and 996A].

Also note that Chapter 961 has its own repeater provision for controlled substance offenses [see § 961.48] and several penalty enhancer provisions [see §§ 961.46, 961.49, and 961.495].

Finally, Chapter 980, Sexually Violent Persons, allows commitment after the completion of a prison sentence for persons found to be "sexually violent persons." See Wis JI Criminal 2501 - 2503. This has been labeled a "collateral consequence." See the list in footnote 3.

The Committee does not believe that the trial judge is required to explain all of these provisions to the defendant during the plea acceptance procedure. However, when a penalty enhancer is charged, the maximum penalty is affected and should be disclosed on the record. Advice on the mandatory minimum

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sentence under § 939.616 Mandatory minimum sentence for certain child sex offenses, is required. State v. Thompson, 2012 WI 90, 342 Wis.2d 674, 818 N.W.2d 904.

Section 971.08(1)(c) requires advice on deportation consequences. See footnote 8, below.

5. If the reading of the charging document is waived, assure that the waiver appears in the record.

6. **Personal Inquiry.** It is a personal inquiry of the defendant that is required. The court must assure that the defendant's own responses appear on the record.

Personal inquiry is required even though the defendant is represented by competent counsel. The personal inquiry requirement is one of the major emphases of the cases that have required the formal plea procedures. In State v. Ernst, 43 Wis.2d 661, 170 N.W.2d 713 (1969), the Wisconsin Supreme Court specifically recognized that "under Boykin v. Alabama, Wisconsin courts can no longer indulge in the presumption" that counsel has fulfilled his or her duty of proper representation. 43 Wis.2d 661, 674. Whether or not one agrees with the conclusion or its assumptions about counsel's role, it is clear that the burden of assuring that a defendant understands the nature and effect of the plea has been unequivocally imposed on the trial judge. This was reaffirmed in State v. Brown, 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906, where the court recognized that the U.S. Constitution can be satisfied by reliance on counsel's representations [see, Bradshaw v. Stumpf, 545 U.S. 175 (2005)]. The court noted, that "[s]ince Bangert, however, we have interpreted Wis. Stat. § 971.08 to require a court to obtain more direct confirmation of a defendant's understanding before accepting a plea." 2006 WI 100, ¶56, footnote 26.

If the plea is tendered by counsel, it is important that the defendant personally acknowledge that the plea is the defendant's own decision. The same practice should be followed at any other time during the plea acceptance procedure when counsel answers a question that has been directed to the defendant.

In State v. Burns, 226 Wis.2d 762, 594 N.W.2d 799 (1999), the court affirmed a conviction where the defendant was never directly asked "How do you plead?" and did not state his plea on the record. However, the court "urges circuit courts to follow the usual and strongly preferred practice of asking defendants directly and personally in open court and on the record how they plead to the charged offenses and of entering the pleas on the record." 226 Wis.2d 762, 765. SM 32, and question no. 1 in particular, was cited with approval.

If the defendant refuses to answer the questions that constitute the plea acceptance colloquy, the plea should not be accepted. See, State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

With respect to misdemeanor cases, § 971.04(2) provides that defendants may authorize their attorney in writing to act on their behalf in any manner and may "be excused from attendance at any or all proceedings." This conflicts with § 971.08(1)(a) which requires that the court must address the defendant personally before accepting a plea of guilty or no contest, and makes no exception for misdemeanors. The court of appeals dealt with the conflict in State v. Krause, 161 Wis.2d 919, 927, 469 N.W.2d 241 (Ct. App. 1991), holding that both statutes should be given effect:

> While a misdemeanant need not be present at a plea hearing, we conclude that the remaining requirements of 971.08, Stats., are equally applicable in the case of misdemeanors as in felonies.

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Apparently, the court must conduct an inquiry of counsel to determine if the defendant personally is making a voluntary and understanding plea.

7. **No Contest and Alford Pleas.** If the defendant pleads "no contest" or "Alford," the court should make it clear to the defendant that, for the purposes of the criminal proceeding, the plea will have the same effect as an unequivocal plea of guilty. State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 632, 579 N.W.2d 698 (1998). The full plea acceptance procedures should be followed for no contest pleas, which may be entered only "subject to the approval of the court." § 971.06(1)(c). An Alford plea is a guilty plea accompanied by a claim of innocence, which the court may reject if it concludes that the plea is contrary to the public interest or the interest of justice. State v. Garcia, 192 Wis.2d 845, 859, 532 N.W.2d 111 (1995). In State v. Williams, 2000 WI App 123, 237 Wis.2d 591, 614 N.W.2d 11, the court of appeals implied that a judge's flat refusal to accept an Alford plea because "I have just made a policy that I will not accept one" would be error. However, the alleged error was considered waived in that case.

The acceptance and effects of no contest and Alford pleas are discussed in SM 32A, No Contest and Alford Pleas. [Garcia, supra, cited SM 32A with approval.]

The material in brackets provides a definition of the no contest and Alford pleas and attempts to assure that the defendant understands that those pleas result in an unequivocal judgment of guilty. The Committee was prompted to add the material by the decision in State v. Garcia, supra, where the Wisconsin Supreme Court reaffirmed that "the circuit courts of Wisconsin may, in their discretion, accept Alford pleas." The court cited SM 32A with approval with respect to its recommendation that:

> judges . . . ask defense counsel on the record whether counsel has discussed the consequences of the plea with the defendant and if so, whether the defendant has expressed his understanding of those consequences.
> 192 Wis.2d 845, 858 59.

Further, the court added the following in a footnote:

> Although not required to make the plea acceptable, including a definition of an Alford plea on the guilty plea questionnaire may help to further document the defendant's understanding of the plea. We invite the Wisconsin Jury Instruction Committee to consider making such a change on the form.
> 192 Wis.2d 845, 860, at footnote 6.

The additions to the text of SM 32 are intended to address these concerns.

8. **Deportation, exclusion from admission, denial of naturalization.** This advice is in **bold** because it is expressly required by § 971.08(1)(c), which provides that before the court accepts a plea of guilty or no contest, it shall:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

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Section 971.06(3) prohibits any inquiry into the citizenship status of the defendant: "At the time a defendant enters a plea, the court may not require the defendant to disclose his or her citizenship status."

The required warning must be given at the time the plea colloquy is conducted. Giving the warning at the arraignment is not a substitute for what the statute clearly requires. State v. Vang, 2010 WI App 118, 328 Wis.2d 251, 789 N.W.2d 115.

There has been extensive litigation regarding whether plea withdrawal is required where the advice on immigration consequences was not given or not given precisely as required by the statute. The advice for the judge accepting a plea, however, should be clear: give the warning in the words of the statute. Motions to withdraw guilty pleas are also frequently based on ineffective assistance of counsel. See cases collected at the end of this footnote. In Padilla v. Kentucky, 559 U.S. 356 (2010), the court held that the right to effective assistance of counsel extends to advise on deportation consequences.

In State v. Reyes Fuerte, 2017 WI 104, 378 Wis.2d 504, 904 N.W.2d 773, the Wisconsin Supreme Court found that the advice given by the trial judge on immigration consequences fell short of what § 971.08(1)(c) requires in two ways: it referred to "resident" instead of "citizen" and failed to mention "denial of naturalization." The court held, however, that harmless error analysis applies to this situation and concluded that the error was harmless:

> ¶41 We hold that, under the circumstances of this case, the circuit court's errors in giving the plea advisement required by Wis. Stat. § 971.08(1)(c) are harmless. Reyes Fuerte knew of the potential immigration consequences because his counsel went over the plea waiver form, which contains a substantially similar advisement, with him in Spanish. The failure to bring any ineffective assistance claim under Padilla further indicates that counsel did inform Reyes Fuerte of the potential immigration consequences of his plea. Finally, the two immigration consequences relevant to Reyes Fuerte were raised by the circuit court, such that he had knowledge of those potential consequences. To allow him to withdraw his plea now would be to allow him to "manipulate [Wisconsin's] criminal justice system in order to circumvent the immigration laws;" we cannot accept that the legislature intended to, or actually did, write § 971.08(2) to have such a result. State v. Issa, 186 Wis. 2d 199, 212, 519 N.W.2d 741 (Ct. App. 1994) (Fine, J., concurring).

Reaching this conclusion required the overruling of State v. Douangmala, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1:

> ¶36 In light of the foregoing, we hold that Douangmala was objectively wrong because it failed to consider the mandatory language in Wis. Stat. §§ 971.26 and 805.18 and thus overrule it. Additionally, we reinstate Chavez, Issa, Lopez, and Garcia as valid law and binding precedent.

The court still encouraged reading the statutory script verbatim:

> ¶19 Before we begin our analysis, we take a moment to remind circuit court judges that simply reading the language of the advisement from Wis. Stat. § 971.08(1)(c) is by far the best option. The use of quotation marks (such as those in § 971.08(1)(c)) is "an unusual and significant legislative signal" that should be given effect by circuit courts. State v. Garcia, 2000 WI App 81, ¶16, 234 Wis. 2d 304, 610 N.W.2d 180. In this instance, those quotation marks are best given

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effect by reading the advisement as written in the statute. See id. Though, as a result of this opinion, harmless error now applies as a "safety net" for circuit courts, the best practice remains reading the exact language of the statute. Id.

State v. Douangmala, 2002 WI 62, 253 Wis.2d 173, 644 N.W.2d 891, was overruled by Reyes Fuerte. In it, the court answered "yes" to the following question: "If a circuit court fails to give the deportation warning required by § 971.08(1)(c) when accepting a guilty or no-contest plea, is a defendant entitled to withdraw the plea later upon a showing that the plea is likely to result in the defendant's deportation, regardless of whether the defendant was aware of the deportation consequences of the plea at the time the defendant entered the plea?" The court said that the result is compelled by the specific terms of § 971.08(2).

Reyes Fuerte reinstated the following cases as "valid law and binding precedent": State v. Chavez, 175 Wis.2d 366, 498 N.W.2d 887 (Ct. App. 1993); State v. Issa, 186 Wis.2d 199, 519 N.W.2d 741 (Ct. App. 1994); State v. Lopez, 196 Wis.2d 725, 539 N.W.2d 700 (Ct. App. 1995); and, State v. Garcia, 2000 WI App 81, 234 Wis.2d 304, 610 N.W.2d 180.

In State v. Garcia, 2000 WI App 81, ¶1, 234 Wis.2d 304, 610 N.W.2d 180, the court held that "a trial court is required to personally address the defendant in the express words of the statute," referring to s. 971.08(1)(c). Question 3 uses the express words of § 971.08(1)(c).

Also see State v. Issa, 186 Wis.2d 199, 519 N.W.2d 741 (Ct. App. 1994), ordering withdrawal of a plea where the trial judge relied on a written plea acceptance form instead of personally addressing the defendant to assure understanding of deportation consequences.

In State v. Rodriguez, 221 Wis.2d 487, 585 N.W.2d 701 (Ct. App. 1998), the trial court addressed the defendant as required by § 971.08(1). The defendant later sought to withdraw the plea, claiming his misunderstanding of his citizenship status meant that his plea was not voluntarily and intelligently made. The court of appeals held that in this context the deportation consequences were "collateral" and the defendant's own mistake about them did not require withdrawal of the plea.

In State v. Mursal, 2013 WI App 125, ¶16, 351 Wis.2d 180, 839 N.W.2d 173, the court applied the "substantial compliance" doctrine: an immigration advisement substantially complied with § 971.08 if it explained all the elements of the statute; minor linguistic differences that don't change the meaning of the advice do not require plea withdrawal.

In State v. Valadez, 2016 WI 4, 316 Wis.2d 332, 874 N.W.2d 514, when the trial court accepted the defendant's pleas [in 2004 and 2005] it did not include advice on immigration consequences. In 2013, she moved to withdraw her pleas under § 971.08(2). Valadez was a lawful permanent resident and there were no plans to deport her. However, if she left the country and sought to reenter, she would be denied readmission. The court held that she had shown exclusion from admission was likely, satisfying the requirements of § 971.08(2), and was entitled to withdraw her plea. The decision did not resolve the question whether any time limits apply to motions under § 971.08(2).

In State v. Ortiz-Mondragon, 2015 WI 73, 364 Wis.2d 1, 866 N.W.2d 717, the defendant sought to withdraw a no contest plea, alleging ineffective assistance of counsel – specifically, the failure to advise that deportation would be mandatory rather than "a possibility." The supreme court concluded that counsel did not perform deficiently. Because federal immigration law is not "succinct, clear, and explicit" in

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providing that Ortiz Mondragon's substantial battery offense constituted a crime involving moral turpitude, his attorney "need[ed] [to] do no more than advise [him] that pending criminal charges may carry a risk of adverse immigration consequences." ¶5.

In State v. Shata, 2015 WI 74, 364 Wis.2d 1, 866 N.W.2d 717, the defendant made a similar claim, specifically, that counsel was ineffective for failing to advise that deportation would be mandatory rather than "a strong chance." The trial court denied withdrawal but the court of appeals reversed. The supreme court concluded plea withdrawal was not warranted:

> . . . Shata is not entitled to withdraw his guilty plea because he did not receive ineffective assistance of counsel. Specifically, Shata's attorney did not perform deficiently. Shata's attorney was required to "give correct advice" to Shata about the possible immigration consequences of his conviction. Padilla, 559 U.S. at 369. Shata's attorney satisfied that requirement by correctly advising Shata that his guilty plea carried a "strong chance" of deportation. Shata's attorney was not required to tell him that his guilty plea would absolutely result in deportation. In fact, Shata's deportation was not an absolute certainty. Executive action, including the United States Department of Homeland Security's exercise of prosecutorial discretion, can block the deportation of deportable aliens. ¶5.

In State v. Villegas, 2018 WI App 9, 380 Wis.2d 246, 908 N.W.2d 198, a motion to withdraw a guilty plea was denied: counsel was not ineffective in failing to inform the defendant that his plea would render him inadmissible to the United States and ineligible for Deferred Action for Childhood Arrivals (DACA). [The trial court did give the advice required by § 971.08.]

9. **Possession of a firearm.** Section 973.176(1) requires providing this information at the time of sentencing. The Committee concluded that it is a good practice, though not required, to include it at the time the plea is accepted as well.

Section 973.176(1) was created by 1989 Wisconsin Act 142 (effective date: March 31, 1990) and reads as follows:

> FIREARM POSSESSION Whenever a court imposes a sentence or places a defendant on probation regarding a felony conviction, the court shall inform the defendant of the requirements and penalties under § 941.29.

Section 941.29 makes it a Class G felony for a convicted felon to possess a firearm. The maximum term of imprisonment for a Class G felony is ten years: an initial term of confinement of 5 years and 5 years extended supervision. [2001 Wisconsin Act 109 repealed the former penalty structure, which increased the penalty for a second offense.]

Caution should be exercised where a plea agreement purports to avoid the ban on firearm possession. In Koll v. DOJ, 2009 WI App 74, 317 Wis.2d 753, 769 N.W.2d 69, the court held that the Wisconsin Department of Justice was correct in refusing to issue a gun permit to a person convicted of disorderly conduct in a domestic context, even though the plea agreement in the case was specifically tailored to characterize the offense as "non-domestic disorderly conduct" to avoid the collateral consequence of the federal ban on gun possession. However, in an unpublished opinion in a companion case [State v. Koll, 2008AP1403-CR] the court ordered withdrawal of Koll's plea because "Koll was actively misinformed as

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to a collateral consequence of his plea agreement and because the misinformation went to the heart of the plea agreement."

10. **Right to vote.** The text regarding the right to vote is based on CR-227.

11. **Restitution.** In State v. Dugan, 193 Wis.2d 610, 534 N.W.2d 897 (Ct. App. 1995), the court held that warning a guilty plea defendant that restitution may be required is not a mandatory component of the plea acceptance colloquy. But, in a footnote, the court stated:

> . . . we nonetheless think it the better practice for a sentencing court to include the [restitution] warning when taking a plea and to include the warning on the Moederndorfer questionnaire. 193 Wis.2d 610, 624, at footnote 7.

Section 973.20(1r) provides in part:

> When imposing sentence or ordering probation for any crime, . . . the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing, or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.

12. The suggested questions should be modified to fit the case at hand and the preference of the trial judge. Some or all of the questions may be eliminated altogether if a similar inquiry has already been conducted to, for example, set bail, evaluate a waiver of counsel, etc. Additional questions will often be suggested by the defendant's responses.

13. **Plea Agreements.** If there is a plea agreement, it is recommended that it be put in writing and that the written description be made part of the record. If there is not a written agreement, it is essential that the agreement be carefully and completely described on the record. State ex rel. White v. Gray, 57 Wis.2d 17, 203 N.W.2d 638 (1973); State v. Lee, 88 Wis.2d 239, 26 N.W.2d 268 (1979).

Concessions to others; "Package agreements." The court must be alert for indications that the plea agreement contemplates concessions to a relative or close friend. This type of agreement "bears particular scrutiny by a trial or reviewing court conscious of the psychological pressures upon an accused such a situation creates." State ex rel. White v. Gray, 57 Wis.2d 17, 29, 203 N.W.2d 638 (1973). These agreements also must be reviewed from the point of view of whether they are in the public interest. State ex rel. White v. Gray, 57 Wis.2d 17, 29 30. Also see Seybold v. State, 61 Wis.2d 227, 212 N.W.2d 146 (1973).

Regarding "package plea agreements," see State v. Goyette, 2006 WI App 178, 295 Wis.2d 359, 722 N.W.2d 731. A "package plea agreement" refers to "a plea agreement that is contingent on two or more codefendants all entering pleas according to the terms of the agreement. If one defendant does not enter a plea according to the agreement, the State is not bound by the agreement with respect to any of the defendants." 2006 WI App 178, ¶1. The court acknowledged that "package plea agreements carry with them the risk that one of the defendants will be improperly pressured into entering a plea," id. at ¶31, but found that any pressure felt in that case was not improper but was "self-imposed coercive element." See, Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974).

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Charges "dismissed outright." State v. Frey, 2012 WI 99, 343 Wis.2d 358, 817 N.W.2d 436, concluded that "dismissed outright" has no particular meaning for sentencing or plea agreement purposes and reaffirmed the standard rule on what may be considered at sentencing: the sentencing court may consider dismissed charges for proper purposes; the defendant should have the opportunity to "refute the purported inaccuracies of the facts underlying the dismissed charges." In the context of plea agreements, "dismissed charges do not have a static meaning. They are a product of the parties' negotiations and they mean what the parties intend them to mean" subject to the exception "that a plea agreement involving one or more dismissed charges cannot limit what the judge may consider at sentencing." ¶¶77, 78.

"Conditional" pleas. Plea agreements sometimes attempt to provide the defendant with the right to appeal adverse pretrial rulings. These attempts at a "conditional guilty plea" do not confer upon defendants any right to appeal they do not otherwise have. Section 971.31(10) allows appeals of orders denying motions to suppress evidence or motions challenging the admissibility of a statement of the defendant notwithstanding the guilty plea. No other adverse pretrial rulings may be appealed after a plea of guilty, including those relating to the constitutionality of a statute or denying or granting a motion in limine. Review of those issues is waived by a guilty plea. State v. White, 112 Wis.2d 178, 332 N.W.2d 756 (1983); State v. Riekkoff, 112 Wis.2d 119, 332 N.W.2d 744 (1983). The two cases emphasize that there were no "conditional" guilty pleas in Wisconsin and attempts to create them will not be given effect by appellate courts. However, pleas entered on the assumption that they are "conditional" may be subject to withdrawal as not having been voluntarily and intelligently made. This was the result in both White and Riekkoff: the defendant was allowed to withdraw the plea. Thus, in reviewing plea agreements and in accepting pleas generally, the court should be alert for indications that the parties may be trying to create a "conditional" plea.

Limits on sentencing advocacy. Wisconsin cases illustrate the apparent popularity of plea agreements that relate in some way to limitations on sentencing information or advocacy. Prosecutors may agree "not to oppose" a particular sentence or "to remain silent" at sentencing. One danger is that these agreements may conceal relevant information from the sentencing judge. "A plea agreement which does not allow the sentencing court to be appraised of relevant information is void [as] against public policy." State v. Naydihor, 2004 WI 43, Par. 21, 270 Wis.2d 585, 678 N.W.2d 220 (quoting State v. Ferguson, 166 Wis.2d 317, 324, 479 N.W.2d 241 (Ct. App. 1991). Also see the discussion in SM 34 Sentencing Procedures, Standards, And Special Issues, section VII.B. The general rule is clear: The parties cannot agree to limit the information the sentencing judge will consider. Also see, State v. McQuay, 154 Wis.2d 116, 452 N.W.2d 377 (1990).

14. **Advising that the court is not bound by the agreement.** In State v. Hampton, 2004 WI 107, ¶42, 274 Wis.2d 379, 683 N.W.2d 14, the court held:

> The essence of the mandate is that the court must engage in a colloquy with the defendant on the record at the plea hearing to ascertain whether the defendant understands that the court is not bound by a sentencing recommendation from the prosecutor or any other term of the defendant's plea agreement. The plea colloquy is defective if it fails to produce an exchange on the record that indicates that the defendant understands the court is free to disregard recommendations based on a plea agreement for sentencing.

Question 16 was modified in 2007 to address the Hampton requirement more directly than the previous version did.

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[See footnote 15, below, where the issue of the court and plea agreements is discussed in more depth.]

15. **Plea Agreements and the Trial Judge.** It is the firm policy in Wisconsin that trial judges not involve themselves in plea bargaining. State v. Wolfe, 46 Wis.2d 478, 175 N.W.2d 216 (1970); State v. Erickson, 53 Wis.2d 474, 192 N.W.2d 872 (1972). A 2003 decision of the court of appeals re-emphasized this rule: ". . . we adopt a bright-line rule barring any form of judicial participation in plea negotiations before a plea agreement has been reached." State v. [Corey] Williams, 2003 WI App 116, ¶ 1, 265 Wis.2d 229, 666 N.W2d 58. But see, State v. Hunter, 2005 WI App 5, 278 Wis.2d 419, 692 N.W2d 256: "the Williams rule does not require automatic plea withdrawal whenever a court expresses its view of the strength of the State's case or advises a defendant to consider to the advisability of pursuing a disposition short of trial."

To assure that this policy is carried out, and to assure the integrity of the sentencing function (see Erickson, supra), the judge should make it clear to the defendant that the prosecutor's recommendations about the sentence are not binding on the court and that the court is free to impose the maximum sentence allowed by statute for the offense. See footnote 14, supra.

Advising that a plea agreement will not be followed. Some Wisconsin judges prefer the practice of letting the defendant know if a plea agreement recommends a disposition that the judge finds to be unacceptable and afford the defendant the opportunity to withdraw the guilty plea at that point. (Judges who follow this practice need to modify, or omit, questions 15 and 16.) This is similar to the practice recognized by the ABA Standards For Criminal Justice, which allows the parties to give advance notice of the plea agreement to the judge and allows the judge to indicate whether he or she would concur in the agreement if such concurrence is consistent with the material disclosed in the presentence report. Section 3.3, ABA Standards Relating To The Plea Of Guilty. Also see Rule 11(c) of the Federal Rules Of Criminal Procedure. The Wisconsin Supreme Court has declined to adopt this practice as a statewide requirement. Melby v. State, 70 Wis.2d 368, 234 N.W.2d 634 (1975).

The Wisconsin Supreme Court reviewed the issue in State v. [Adrian] Williams, 2000 WI 78, 236 Wis.2d 293, 613 N.W.2d 132. The defendant in this appeal asked the court "to adopt a new rule of procedure, which would require that if a trial judge anticipates exceeding the state's sentence recommendation under a plea agreement, the trial judge must inform the defendant of that fact and allow the defendant to withdraw his or her plea." ¶1. The court denied the request, reaffirming the traditional rule against judicial participation in the plea agreement process. [Also see, In re the Amendment of Rules, 128 Wis.2d 422 (1986), where the court rejected a petition of the Wisconsin Judicial Council that asked the court to adopt rules for a similar process.]

But see, State v. Marinez, 2008 WI App 105, 313 Wis.2d 490, 756 N.W.2d 570, where the court held that a trial judge may indicate that a plea agreement will not be followed and allow the defendant to withdraw the plea. The court reads the Williams decision, supra, as holding that this procedure should not be required and not that the practice is forbidden.

Promises not to charge or to dismiss or reduce pending charges. While the trial judge is clearly not bound by the prosecutor's recommendations as to sentence, promises to drop pending charges or not to bring potential charges are largely beyond the judge's control. Promises not to pursue uncharged offenses are, of course, generally beyond judicial scrutiny. And, prosecutors are allowed great discretion in making decisions about the dismissal or reduction of pending charges as part of plea agreements. See, for example, United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), and United States v. Ammidown, 497 F.2d 617 (D.C.

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Cir. 1973). However, a trial court retains the authority to refuse to grant a motion to reduce or dismiss charges in limited situations: ". . . (p)rosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court to grant or refuse a motion to dismiss 'in the public interest.'" State v. Kenyon, 85 Wis.2d 36, 45, 270 N.W.2d 160 (1978).

The rule regarding "refusal to dismiss in the public interest" was reaffirmed in State v. Conger, 2010 WI 56, 325 Wis.2d 664, 797 N.W.2d 341. The court held that "a circuit court must review a plea agreement independently and may, if it appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest." ¶3. While what constitutes the public interest "is a consideration that is not capable of precise outlines . . . [and] the factors that a court may weigh . . . will vary from case to case. One appropriate factor among many may well be the viewpoint of law enforcement. . ." ¶4 [The primary concern in the case was a plea agreement calling for the reduction of felony charges to misdemeanors.]

For an application of the Kenyon standard, and a conclusion that a trial court erred in refusing to grant a prosecutor's motion to dismiss, see State v. Rivera-Hernandez, Nos. 2018AP311-CR & 2018AP312-CR, unpublished slip op. (WI App Feb. 20, 2019). A similar conclusion was reached in a federal case originating in Wisconsin, In Re United States Of America [U.S. v. Bitsky], 545 F.3d 450 (7th Cir. 2003).

Section 971.315 requires that "[b]efore a court dismisses a criminal charge against a person, the court shall inquire of the district attorney whether he or she has complied with s. 971.095(2)." See footnote 2, supra.

Limits on sentencing advocacy. Certain types of plea agreements may indicate the need to assure that defendants understand what they have bargained for. This is increasingly common in situations where the agreement involves a prosecutor's commitment to make no recommendation as to sentence or "not to oppose" a particular sentence that the defendant may argue for. If the prosecutor promises to make no recommendations but the presentence report recommends a substantial sentence, has the defendant received what he has bargained for? Literally, he has, if the prosecutor has in fact not argued for the substantial sentence, but as a practical matter, the agreement is not being carried out. The trial judge may have a limited role to play in this situation: in determining whether the defendant understands the plea agreement, it may be appropriate to clarify that the prosecutor's agreement regarding sentence binds only the prosecutor and not the court or the person who may prepare the presentence report. See cases cited in footnote 13, above.

16. **Read-ins.** If the plea agreement includes "read-ins," the description of the agreement must include them. Austin v. State, 49 Wis.2d 727, 183 N.W.2d 56 (1971). The offenses which are "read in" should be identified as accurately as possible to avoid later questions about the scope of the prosecutor's promise not to charge the other offenses. The text regarding read-ins is based on that found in CR-227.

In State v. Sulla, 2016 WI App 46, 369 Wis.2d 405, 880 N.W.2d 659, the defendant sought to withdraw his no contest pleas on the ground that he did not understand the effect a read-in charge could have at sentencing – even though the plea questionnaire and the judge's colloquy addressed the topic. The trial court denied his motion without a hearing; the court of appeals remanded the case for a hearing on Sulla's claim. The supreme court reversed the court of appeals, concluding that no hearing was required and that the record of the plea hearing established that Sulla was fully advised of the effect of the read-ins. Two justices concurred, urging that special care be taken in this situation because, as with Alford pleas, there is

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a need for additional clarification – citing SM-32A, which addresses no contest and Alford pleas, as a model.

In State v. Straszkowski, 2008 WI 65, 310 Wis.2d 259, 750 N.W.2d 835, the defendant sought to withdraw his guilty plea, claiming he did not know that he was admitting that he committed crimes that were read in. The court held that plea withdrawal was not required and sought to clarify the nature of read-ins:

> ¶5 Although the case law on read-in charges is neither consistent nor clear, a proper reading of the history of Wisconsin's read-in procedure demonstrates that it is not a critical component of a read-in charge that the defendant admit guilt of the charge (or that the defendant's agreement to read in the charge be deemed an admission of guilt) for purposes of sentencing. In sum, no admission of guilt from a defendant for sentencing purposes is required (or should be deemed) for a read-in charge to be considered for sentencing purposes and to be dismissed. To avoid confusion, prosecuting attorneys, defense counsel, and circuit courts should hereafter avoid (as they did in the instant case) the terminology "admit" or "deemed admitted" in referring to or explaining a defendant's agreement to read in a dismissed charge. A circuit court should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge.
>
> ¶6 Although we hold that no admission of guilt from a defendant is required for a read-in offense to be dismissed and considered for sentencing purposes, this decision does not bar a circuit court from accepting a defendant's admission of guilt of a read-in charge. This decision does not address what plea colloquy duties a circuit court might have with respect to such an admission, the issue the defendant raises. Our narrow holding is that an admission of guilt is not required by our read-in procedure and that the circuit court should avoid the terminology "admit" or "deemed admitted" in referring to or explaining a read-in charge for sentencing purposes except when a defendant does admit the read-in charge.

NOTE: In some cases, the plea agreement may call for an admission to uncharged offenses or dismissed charges as in, for example, sexual assault cases where the intent is to acknowledge all victims.

17. **Possibility of probation revocation.** Advice on the consequences of probation revocation is not expressly required by Wisconsin case law, but the Committee recommends that it be included to assure that defendants fully understand the potential penalty they are facing. See State v. James, 176 Wis.2d 230, 232 33, 500 N.W.2d 345 (Ct. App. 1993): "in accepting a negotiated plea for probation, the trial court should but is not required to advise the defendant of the potential maximum term to which he or she would be subjected in the event probation is revoked."

18. **Coercion.** The essence of the "coercion" aspect of a plea's voluntariness is that "[w]hen the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced." Rahhal v. State, 52 Wis.2d 144, 151, 187 N.W.2d 800 (1971). The Wisconsin cases have distinguished "self-imposed coercive elements" which do not affect the voluntary nature of the plea: religious beliefs and family desires, Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974); desire to avoid implicating the defendant's wife, Drake v. State, 45 Wis.2d 226, 172 N.W.2d 664 (1969). Also see State ex rel. White v. Gray, 57 Wis.2d 17, 203 N.W.2d 638 (1973).

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In State v. Basley, 2006 WI App 253, 298 Wis.2d 232, 726 N.W.2d 671, the alleged source of coercion was defense counsel's threat to withdraw on the morning of trial. The case was remanded for a hearing on the defendant's motion to withdraw his plea.

19. **Understanding the elements of the crime charged.** Like establishing the factual basis for the plea (see footnote 26), establishing that the defendant understands the crime charged need not be pursued in any single, set manner. Martinkoski v. State, 51 Wis.2d 237, 186 N.W.2d 302 (1971); State v. Bagnall, 61 Wis.2d 297, 212 N.W.2d 122 (1973). The court must "determine a defendant's understanding of the nature of the charge and establish that the defendant has an awareness of the essential elements of the crime." State v. McKee, 212 Wis.2d 488, 491, 569 N.W.2d 93 (1997), citing State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986). McKee rejected the defendant's argument that the trial court was required to specify which aspect of his conduct supported which of the charges against him. If the "essential elements" are identified in the plea colloquy, Bangert does not require that the court define or explain those elements. State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891.

In State v. Brown, 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906, the court ordered withdrawal of a guilty plea because the trial court did not address the facts or elements of the crimes in a manner sufficient to establish that the defendant understood the charges. The court extensively reviewed Bangert [referred to as "a timeless primer"] and again strongly encouraged courts to follow the full plea acceptance procedures as outlined in SM-32.

Methods. Bangert, supra, identified several methods that can be used to ascertain the defendant's understanding of the nature of the charges:

> 1) summarize the elements of the crime by reading from the appropriate jury instructions or from the applicable statute;
> 2) ask defense counsel whether he or she explained the nature of the charge to the defendant and request that counsel summarize the extent of the explanation, including a reiteration of the elements;
>
> 3) expressly refer to the record or other evidence of the defendant's understanding established before the plea hearing, including any signed statements.
> 131 Wis.2d 246, 268.

"Elements" outside the offense definition. The Committee recommends advising on all elements of the crime to which the plea is entered, including elements that are incorporated by reference in the offense definitions. One example is a crime requiring sexual contact – the definition of sexual contact requires that the touching be for a sexual purpose, an element that is sometimes overlooked. See, for example, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998), where plea withdrawal was ordered because the colloquy did not indicate that the defendant understood the State had to prove that the defendant's purpose in touching the child was his own sexual gratification. The same result was reached in State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18. Also see, State v. Bollig, 2000 WI 16, 232 Wis.2d 561, 605 N.W.2d 199: advice on the "purpose" element should have been given but the error was cured by other facts in the record. Also see, State ex rel Patel v. State, 2012 WI App 117, 344 Wis.2d 405, 824 N.W.2d 862 (in a child enticement case based on intent to engage in sexual contact, the purpose of the touching is an element of the crime; however, coram nobis is not the proper remedy for addressing the trial court's failure to identify that element during the plea colloquy).

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There are other similar situations:

- attempts – the elements of the intended crime must be included.
- felony murder – the elements of the underlying felony must be included.
- bail jumping based on commission of a new crime – the elements of the new crime must be included,

There is authority to the contrary with respect to at least two crimes. State v. Steele, 2011 WI App 34, 241 Wis.2d 269, 625 N.W.2d 595, involved a plea to burglary with intent to commit a felony. The court of appeals held that the failure to specify the intended felony in the colloquy was not a defect because the nature of the specific felony was not an essential element of the burglary charge. ¶9. State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, involved a plea to child enticement based on the intent to engage in sexual contact. The supreme court held that the failure to specify the elements of sexual contact in the colloquy was not a defect because it was not an essential element of the child enticement charge.

Despite the decisions in Hendricks and Steele holding that plea withdrawal is not required where there is arguably a shortfall in the elements addressed in the colloquy, the Committee concluded that the preferred plea acceptance practice is to include them.

Inconsistencies between the plea questionnaire and the oral colloquy. In State v. Brandt, 226 Wis.2d 610, 594 N.W.2d 759 (1999), the defendant sought to withdraw his plea because a written form that was used was inaccurate as to the elements of the crime. However, the trial court conducted a complete and accurate oral colloquy. The supreme court concluded that "where . . . a circuit court ignored the plea questionnaire in its colloquy concerning the elements of the crimes, the adequacy of that colloquy rises or falls on the circuit court's discussion at the plea hearing. In such cases, the adequacy or deficiency of the plea questionnaire is not at issue because it does not constitute the basis on which the plea is accepted." 226 Wis.2d 610, ¶24.

20. **Special issues.** The duty to inquire may extend beyond the statutorily defined elements of the offense. So-called penalty enhancers, such as committing a crime while armed with a dangerous weapon (§ 939.63), should be included in the description of the "elements" of the crime. (See footnote 4, supra, for a complete list of penalty enhancers.)

Likewise, especially complicated issues relating to the charge should also be explored. For example, if the defendant is charged as an aider and abettor, the court should make it clear that if the plea is accepted, the defendant stands in exactly the same position as the one who directly committed the crime. See Nash v. Israel, 707 F.2d 298 (7th Cir. 1983). The plea colloquy must address party to crime liability in order to show that the defendant had the necessary understanding of the crime charged. State v. Howell, 2007 WI 75, ¶¶44-51, 301 Wis.2d 350, 734 N.W.2d 48; State v.[James] Brown, 2006 WI 10, ¶55, 293 Wis.2d 594, 716 N.W.2d 906. But see, State v. [Calvin] Brown, 2012 WI App 139, ¶15, 345 Wis.2d 333, 824 N.W.2d 916, holding that advice on party to crime liability would have been superfluous where the facts showed that the defendant directly committed the crime (even though the charge referred to party to crime).

Defenses. Inquiry into defenses which are fairly raised by the facts known to the judge is recommended at this point in the plea acceptance procedure. For example, if, in a battery case, there is evidence that might support a claim of self-defense, the court should inquire to assure that it has at least

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been considered by the defendant and defense counsel. Case law has discussed this issue in connection with the factual basis requirement. See footnote 26.

In State v. Ravesteijn, 2006 WI App 250, 297 Wis.2d 663, 727 N.W.2d 53, the defendant challenged his guilty plea to kidnapping for ransom on the ground that he was not advised by the court that the penalty could be reduced from a Class B to a Class C felony if the victim was released without permanent physical injury. The court of appeals apparently holds that the plea was valid, but:

> ¶31. . . . . Ravesteijn's unknowing waiver of the opportunity to reduce the charge to a Class C felony and thereby reduce his potential punishment resulted in manifest injustice. Resentencing is all that is necessary to correct the injustice done here. Therefore the sentence imposed pursuant to Wis. Stat. § 940.31(2)(a), a Class B felony, is set aside and vacated. The cause is remanded for a determination of whether Ravesteijn is guilty of a Class B or Class C felony.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If the defendant was raped, the act of having sexual intercourse with a child does not constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, 2000 WI App. 158, 238 Wis.2d 74, 616 N.W.2d 144, to conclude that the entire definition of sexual intercourse in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction."

21. **Equivocal or vague responses.** If the defendant denies an element of the crime, or equivocates about its existence, a careful inquiry must be made to assure that the defendant actually wants to plead guilty to that crime. The denial or vague response may be an indication that the defendant is not certain about admitting guilt. Responses of that nature should not be considered the equivalent of an express intention to plead no contest or to enter an Alford plea. See the discussion in SM 32A regarding the special considerations in accepting no contest and Alford pleas.

If, after further inquiry, the defendant persists in denying an essential element, the court should not accept the guilty plea (unless an Alford plea is expressly being pursued). Johnson v. State, 53 Wis.2d 787, 193 N.W.2d 659 (1972); State v. Stuart, 50 Wis.2d 66, 183 N.W.2d 155 (1971).

22. The material in brackets was added in 1995 in part as a response to the decision in State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), see footnote 7, supra.

The Committee does not encourage or recommend the routine acceptance of Alford or no contest pleas. The alternatives provided are intended to assure that, if the trial court decides to accept those pleas, the defendant clearly understands the consequences and that a complete record is made of that understanding.

23. **Waiver of trial-related rights.** State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), reaffirmed the requirement that the trial court make a record of the defendant's understanding of the constitutional rights being waived by the plea. The court also stated:

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> Henceforth, we will also require as a function of our supervisory powers that state courts at the plea hearing follow the provisions set forth in Wis JI Criminal SM 32 (1985), Part V, Waiver of Constitutional Rights, or specifically refer to some portion of the record or communication between defense counsel and defendant which affirmatively exhibits defendant's knowledge of the constitutional rights he will be waiving. The court must then as before, ascertain whether the defendant understands he will be waiving certain constitutional rights by virtue of his guilty or no contest plea.
> 131 Wis.2d 246, 271 72.

[NOTE: What Bangert refers to as "Part V" is numbered "VI." in this version.]

In State v. Pegeese, 2019 WI 60, — Wis.2d —, 928 N.W.2d 590, the Wisconsin Supreme Court concluded that courts are not required to address each constitutional right that is waived:

> ¶4 . . . We further decline to exercise our superintending authority to impose a specific requirement that at a plea hearing circuit courts must individually recite and specifically address each constitutional right being waived and then otherwise verify the defendant's understanding of each constitutional right being waived.

However, the decision refers to SM-32 in footnote 8 at ¶41:

> 8. Though today we do not require circuit courts to recite any particular magic words when conducting a plea colloquy, circuit courts should be mindful of the suggested plea colloquy in Wis JI–Criminal SM-32 (2007). See Bangert, 131 Wis. 2d at 268 (stating that circuit courts can use Wis JI–Criminal SM-32 (1985) as one method of fulfilling the requirements under Bangert).

There must be assurance that the defendant is personally waiving trial-related constitutional rights, even if a written plea acceptance form is used. See State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987) and State v. Hansen, 168 Wis.2d 749, 485 N.W.2d 74 (Ct. App. 1992). If the defendant attempts to enter a no contest plea but refuses to waive any constitutional rights, the plea should not be accepted. See State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

The material in this section was revised in 2019 to make it more consistent and understandable. No change in substance was intended.

24. Trial courts may wish to change the wording of the first part of question 23 for Alford pleas. The following is suggested:

> "By entering an Alford plea, you are conceding that the State has strong evidence that you committed the crime and, thus, ..."

25. **Entry of the plea.** Note that SM 32 advises that the plea be "entered" at this point, but not "accepted." The distinction is an important one, because jeopardy attaches upon the acceptance of the plea. State v. Comstock, 168 Wis.2d 915, 947, 485 N.W.2d 354 (1992). The procedures set forth to this point are intended to assure that the plea is voluntarily and understandingly made. Before formally accepting the plea, the court must also be satisfied that a factual basis exists.

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26. **Factual Basis.** In Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969), the Wisconsin Supreme Court held that the then-existing procedures of Rule 11 of the Federal Rules of Criminal Procedure were required in state courts as a matter of federal constitutional law, citing Boykin v. Alabama, 395 U.S. 238 (1969). [It is now clear that Rule 11 procedures are not constitutionally required in state practice. State v. Bangert, supra, footnote 20, at 259 60.] The text of what is now Rule 11(b)(3) is the source of the "factual basis for the plea" requirement: "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."

The statutory requirement in Wisconsin is that the court "make such inquiry as satisfies it that the defendant in fact committed the crime charged." Section 971.08(1)(b). It may be helpful to view the factual basis as requiring that facts be presented to support a finding that each element of the crime is present.

Wisconsin cases have referred to the purpose of the factual basis as "determining whether the facts, if proved, constitute the offense charged and whether the defendant's conduct does not amount to a defense." Edwards v. State, 51 Wis.2d 231, 236, 186 N.W.2d 193 (1971). In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court held that:

> . . . a factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one. ¶16

Two justices dissented, citing the earlier cases like Edwards for the "does not constitute a defense" rule. The majority apparently accepted this as a general rule, but concluded it did not apply on the facts of the Black case.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry. See the discussion in footnote 20, supra.

The Committee recommends that the trial court inquire into defenses that are fairly raised by the facts relied on to establish the factual basis for the plea.

27. **Factual Basis for a Related Crime.** In most cases, a factual basis is established for the crime to which the plea is entered. Sometimes, usually in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct which the factual basis establishes. For example, a defendant may plead guilty to a disorderly conduct charge in a case originally charged as theft or burglary. In the Committee's judgment, it should be sufficient if a factual basis is shown for a more serious offense that is related to the defendant's conduct. This should be the case even if a true greater-and-lesser included offense relationship does not exist. A flexible approach is especially important in light of the strict "statutory elements" test used to analyze lesser included offenses. See, for example, Randolph v. State, 83 Wis.2d 663, 266 N.W.2d 334 (1978). Also see, SM-6, Jury Instructions On Lesser Included Offenses.

This conclusion is arguably inconsistent with part of the description of the factual basis requirement in Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969). Ernst quoted Federal Rule 11 and McCarthy v.

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United States, 394 U.S. 459 (1969), in stating that the record must show that the conduct which the defendant admits, ". . . constitutes the offense charged in the indictment or information, or an offense included therein to which the defendant is pleading guilty." (Emphasis added.) Taken literally, this would mean, for example, that on a negotiated plea of guilty to disorderly conduct arising out of theft, the court could not accept the plea since disorderly conduct is not a lesser included offense of theft. It is the opinion of the Committee, however, that the Wisconsin Supreme Court did not intend to so confine or narrow guilty plea practice and that the requirements of Ernst are met if the trial court satisfies itself that the plea is voluntarily and understandingly made and that a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the defendant's conduct. Two decisions of the Wisconsin Court of Appeals reach different results on this issue.

In State v. Harrell, 182 Wis.2d 408, 513 N.W.2d 676 (Ct. App. 1994), the defendant was charged with three counts of first degree sexual assault of a child; another count was added after the preliminary examination. A plea agreement was reached whereby the defendant entered a no contest plea to one count of second degree sexual assault of a child and one count of third degree sexual assault. The parties agreed to use the complaint as the factual basis. The defendant moved to withdraw his plea after sentencing, claiming that he was not advised he was waiving his right to a unanimous jury and that no factual basis was established for the third degree sexual assault offense because there was no showing of "without consent." The court of appeals rejected both claims. As to the factual basis issue, the court noted that more flexibility is allowed when there is a plea bargain. It is enough if a factual basis is shown for the offense to which the plea is entered or for a more serious offense reasonably related to that offense. In a footnote, the court indicated its decision "adopts in part the reasoning of the Wisconsin Jury Instruction Committee," citing SM 32. 182 Wis.2d 408, 418.

In State v. Harrington, 181 Wis.2d 985, 512 N.W.2d 261 (Ct. App. 1994), the defendant was charged with burglary and agreed to plead no contest to felony theft. The probable cause statement in the complaint was not changed. The parties stipulated that the complaint furnished a factual basis for the plea and the defendant was found guilty of felony theft. On appeal, the court found that the complaint furnished a factual basis for burglary but not for felony theft because there were no facts regarding the value of the stolen property. The court said that the state pointed to no authority for the proposition that a factual basis for the more serious offense is sufficient and granted relief to the defendant. SM 32 was not mentioned. The relief granted was to remand for sentencing on misdemeanor theft – not withdrawal of the plea, citing State v. White, 85 Wis.2d 485, 271 N.W.2d 97 (1978).

Harrell and Harrington flatly contradict one another. The conflict was not reviewed: the petition to review in Harrell was dismissed as untimely; no petition to review was filed in Harrington. No published decision has resolved this conflict although two decisions have appeared to accept the Harrell rule. In State v. Smith, 202 Wis.2d 21, 549 N.W.2d 232 (1996), the court held that an Alford plea could not be accepted to a crime that it was "legally impossible" for him to commit. "Strong proof of guilt" could not be found in that situation because the crime to which the plea was entered required that the victim be under the age of 16 and it was undisputed that the victim was 16 years old. The court acknowledged the Harrell decision, but found it inapplicable in this situation because there could not be "strong proof" of the age element of the crime. In State v. West, 214 Wis.2d 468, 571 N.W.2d 196 (Ct. App. 1997), the court of appeals declined to apply Harrell because the crime to which the plea was offered and the crime for which a factual basis was offered had the same penalty. Thus, the court held, there was no factual basis for the crime of conviction or for a more serious offense.

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In light of this history, the Committee reaffirms its conclusion that it should be sufficient "that a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the defendant's conduct." Trial judges should be cautious of offers to "stipulate to the complaint" as the factual basis, where the plea is to a different offense than the one charged in the complaint.

28. **Alford pleas – "strong evidence of guilt."** To accept an Alford plea, the court must find that the evidence the State would offer at trial constitutes "strong proof of guilt." State v. Garcia, 192 Wis. 2d 845, 859 60, 532 N.W.2d 111 (1995). Also see, State v. Johnson, 105 Wis.2d 657, 663, 314 N.W.2d 897 (Ct. App. 1991). "The requirement of a higher level of proof in Alford pleas is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's 'protestations' of innocence." State v. Smith, 202 Wis.2d 21, 27, 549 N.W.2d 232 (1996). "'Strong proof of guilt' is not the equivalent of proof beyond a reasonable doubt, but it is 'clearly greater than what is needed to meet the factual basis requirement under a guilty plea.'" State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 645, 579 N.W.2d 698 (1998), citing State v. Smith, supra.

The Alford decision used the phrase "strong evidence of guilt," while the Wisconsin decisions tend to use "strong proof of guilt." The Committee does not believe there is a significant difference between "evidence" and "proof" in this context; the term "strong evidence of guilt" is used in the Special Material.

29. **Factual basis – methods.** Edwards v. State, 51 Wis.2d 231, 186 N.W.2d 193 (1971); Morones v. State, 61 Wis.2d 544, 213 N.W.2d 31 (1972). Accepted methods are listed in the text accompanying notes 31 34.

Some courts follow a practice of personally addressing defendants to establish the factual basis, or of asking defendants if they agree with the facts established by the state. It may not be possible to require defendants to incriminate themselves, even though the guilty plea is being entered. In a different context, the Wisconsin Supreme Court held that the privilege against self-incrimination survives a plea of guilty and continues at least until sentencing. State v. McConnohie, 121 Wis.2d 57, 358 N.W.2d 256 (1984). Also see, Mitchell v. U.S., 526 U.S. 314 (1999): neither a guilty plea nor making statements at the plea colloquy waive the 5th Amendment privilege.

The relationship between determining the factual basis and the defendant's agreement that a factual basis exists was considered in State v. Thomas, 2000 WI 13, 232 Wis.2d 714, 605 N.W.2d 836. The court held that "the defendant need not admit to the factual basis in his or her own words; the defense counsel's statements suffice." 232 Wis.2d 714, ¶18. "All that is required is for the factual basis to be developed on the record – several sources can supply the facts." 232 Wis.2d 714, ¶20. "[A] judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." 232 Wis.2d 714,¶22.

Not only is a full confession not required, a guilty plea may be accepted even if the defendant maintains innocence. North Carolina v. Alford, 400 U.S. 25 (1970); State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995). See footnote 25, supra. [For a discussion of the acceptance and effects of an "Alford plea, see SM 32A, No Contest And Alford Pleas. SM 32A emphasizes that before an Alford plea is accepted, the judge take care to insure that there is strong evidence of guilt and that the defendant clearly wants to plead guilty despite his claim of innocence, with full understanding of the charge, of its consequences, and with the advice of competent counsel.]

30. Edwards, supra, 51 Wis.2d 231, 236.

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31. Edwards, Morones, supra. But see Christian v. State, 54 Wis.2d 447, 195 N.W.2d 470 (1972), holding, in absence of stipulation of parties, that while the record of the preliminary did show the critical facts of the case, alone it would not have been enough to establish factual basis for the plea.

32. Edwards, supra; Spinella v. State, 85 Wis.2d 494, 271 N.W.2d 91 (1978).

33. Bressette v. State, 54 Wis.2d 232, 194 N.W.2d 635 (1972); State v. Jackson, 69 Wis.2d 266, 230 N.W.2d 832 (1975); and Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974).

34. Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974).

35. Even if there is a stipulation to the factual basis, the court must find that facts are established which are sufficient to support all the required elements of the crime.

36. **Repeater provisions.** Repeater provisions can be an issue at three different stages of the plea acceptance procedure: 1) when the maximum penalty for the offense is identified – see footnote 3, supra, recommending that "all applicable penalty enhancers should be included in the description of the maximum penalty, such as repeater allegations under § 939.62. . ."; 2) when the defendant's understanding of the crime charged is determined – see footnote 19, supra, advising that this duty may extend beyond the statutorily defined elements of the offense to things like penalty enhancers; and, 3) when the factual basis for the plea is established – question 31 was added to meet this need, not only to assure the validity of the plea but also to provide the proof of repeater status required before sentencing.

Adding a question like number 31 was suggested by the court of appeals in State v. Goldstein, 182 Wis.2d 251, 261, 513 N.W.2d 631 (Ct. App. 1994):

One simple and direct question to the defendant from either the prosecutor or the trial judge asking whether the defendant admits to the repeater allegation will, in most cases, resolve the issue. We suggest that trial judges include this question in their colloquy with the defendant at the plea hearing (if there is one) or, otherwise, at the time of sentencing.

The Wisconsin Supreme Court has given similar advice in a case involving sentencing as a repeater after a jury trial: "The trial court may ask the defendant the direct question while observing the defendant's criminal record before him whether the defendant was convicted on a particular date of a specific crime. . . ." State v. Farr, 119 Wis.2d 651, 659, 350 N.W.2d 640 (1984).

Question 31 is modeled after the one suggested in Farr.

37. In the Committee's judgment, it should be sufficient if a factual basis is shown for a more serious offense that is related to the defendant's conduct. See the discussion in footnote 27, supra.

38. It is at this point that the plea is formally accepted. This is when jeopardy attaches. See State v. Comstock, discussed in footnote 25, supra.

39. In the usual case, the court states that the defendant is adjudged convicted immediately after the finding of guilty is made. However, practices are common which stop short of a finding of guilt or entry of a judgment of conviction. The court should accept the plea but defer making a finding of guilt. Section

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961.47, Conditional Discharge for Possession as First Offense, authorizes this sort of procedure. Persons found guilty of possession of a controlled substance under § 961.41(3g)(b), and who have not previously been convicted of a crime involving controlled substances, are eligible for special disposition under this section. No judgment of conviction is entered, and the defendant avoids a criminal conviction if probation is successfully completed. (Section 961.47 states that a "judgment of guilt" is not entered. The Committee believes "judgment of guilt" is the equivalent of "judgment of conviction.")

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SM-32A NO CONTEST AND ALFORD PLEAS

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SM-32A NO CONTEST AND ALFORD PLEAS

I. The Pleas Compared

Guilty pleas are recognized as substitutes for the adjudication of guilt by trial for two reasons: the plea constitutes a waiver of trial by the accused (sometimes characterized as a consent to the entry of judgment); and the plea constitutes an express admission that the defendant committed the act charged. The no contest plea and the Alford plea both lack an express admission of guilt. With a no contest plea, the defendant refuses to admit guilt (or admits guilt solely for the purposes of the instant criminal proceeding). With an Alford plea, the defendant expressly maintains innocence while choosing to plead guilty.

The legitimacy of both pleas has been recognized by the courts. But special caution is required of the trial judge who considers accepting either a no contest or an Alford plea. It must be assured that the defendant knows what he or she is doing and that the apparent conflict between the refusal to admit guilt and the consent to entry of judgment is expressed on the record and acknowledged.

The terms "no contest plea" and "Alford plea" are sometimes used interchangeably. However, the Alford case clearly dealt with a guilty plea, not a plea of no contest, so there are two different entities. An Alford plea goes beyond a no contest plea in the sense that the former involves an outright claim of innocence while the latter involves something less than an express admission of guilt. [Cited with approval in State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 632, 579 N.W.2d 698 (1998).]

While there may be a conceptual difference between the two pleas, for purposes of accepting the pleas, any such difference "is of no constitutional significance . . ., for the constitution is concerned with practical consequences, not the formal categorizations of state law." North Carolina v. Alford, 400 U.S. 25, 37 (1970). [For reference to a complete hybrid, a "no contest plea with a claim of innocence," see Estate of Safran, 102 Wis.2d 79, 306 N.W.2d 27 (1981).]

II. Plea Of No Contest

A. Description

Historically labeled "nolo contendere," the correct title for this plea is now "no contest." The essential characteristics of the no contest plea are:

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1. when accepted by the court it constitutes an admission of guilt for the purposes of the case which supports a judgment of conviction and is in that respect equivalent to a plea of guilty; and
2. the plea cannot be used collaterally against the defendant, as, for example, in a later civil action.

Lee v. State Board of Dental Examiners, 29 Wis.2d 330, 334, 139 N.W.2d 61 (1966).

B. Effect Of A No Contest Plea

1. A no contest plea supports a fully effective criminal conviction

Whatever the distinction between a no contest plea and a guilty plea, it does not carry over to the conviction. "A judgment of conviction based on a plea of nolo contendere is a conviction which contains all the consequences of a conviction based on a plea of guilty or a verdict of guilty. There is no difference in the nature, character or force of a judgment of conviction depending upon the nature of the underlying plea." Lee, supra, 29 Wis.2d 330, 335. But see § 908.03(22) discussed below.

Thus, a conviction following a no contest plea is a full-blown criminal conviction for all purposes, such as later invocation of repeater statutes (State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928); State v. Brozosky, 197 Wis. 446, 222 N.W. 311 (1928)) and revocation of a professional license (State v. Lee, supra).

2. Collateral use of a no contest plea is prohibited

The usual distinction between a guilty plea and a no contest plea is that a guilty plea constitutes an express admission of guilt which can be used against the defendant in collateral proceedings while a no contest plea is an admission only for the purposes of the criminal case and cannot be collaterally used. This distinction is recognized and preserved in the Wisconsin Rules of Evidence.

Section 904.10 forbids the later use of no contest pleas, offers to plead no contest, and statements made in connection with those pleas or offers:

> 904.10 Offer to plead guilty; no contest; withdrawn plea of guilty. Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court

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> or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

Section 908.03(22) recognizes that the hearsay rule does not exclude evidence of criminal judgments offered to prove facts essential to the judgment but provides an exception for judgments of conviction based on no contest pleas:

> 908.03 Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony as defined in §§ 939.60 and 939.62(3)(b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against person other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Evidence of criminal judgments not based on no contest pleas may be inadmissible in Wisconsin on other-than-hearsay grounds. See Estate of Safran, 102 Wis.2d 79, 306 N.W.2d 27 (1981).

Thus, the defendant whose no contest plea is accepted is assured that the plea, statements made in connection with it, and the judgment entered upon it will all be inadmissible in later civil actions or other collateral proceedings. The conviction, however, is admissible to prove the fact of conviction itself. See discussion above.

C. Acceptance Procedures For No Contest Pleas

1. Guilty plea procedures apply

The same acceptance procedures are required for pleas of no contest as are required for guilty pleas. Section 971.08 applies to both types of pleas, requiring personal inquiry of the defendant to determine that the plea is made voluntarily and supported by a factual basis.

Wisconsin cases also tend to lump both pleas together when discussing acceptance procedures and the standards for withdrawing a plea. See, for example, State v. Galvan, 40 Wis.2d 679, 162 N.W.2d 622 (1968); State v. Schill, 93 Wis.2d 361, 286 N.W.2d 836

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(1980); State v. Lee, 88 Wis.2d 239, 276 N.W.2d 268 (1979). If a no contest plea is accompanied by a refusal to answer the questions constituting the plea acceptance colloquy and a refusal to waive trial related rights, the plea should not be accepted. See State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

2. The court should assure that the defendant understands the consequences of the plea

It appears that some defendants view the no contest plea as an indication of lesser culpability than a plea of guilty. [See State v. Morse, 2005 WI App 223, ¶11, 287 Wis.2d 369, 706 N.W.2d 152, where the defendant sought to withdraw a no contest plea because the trial court failed to "dispel his misconception that he would receive a lesser sentence for pleading no contest." The motion was denied.] Trial courts accepting no contest pleas may be well advised to point out to the defendant that for purposes of the criminal case, the no contest plea is the basis for a criminal conviction that carries the full weight and force of a conviction resulting from a guilty plea or a jury finding of guilt. The conviction may be the basis for later criminal repeater charges or for collateral consequences such as revocation of professional license. See discussion above.

D. Court Authority To Reject No Contest Pleas

1. Court approval is required

Section 971.06 provides that a defendant may enter a no contest plea "subject to the approval of the court." This is consistent with Wisconsin case law, which has characterized the no contest plea as one which the defendant "may not interpose as a matter of right. It is received at the discretion of the court." State v. Suick, 195 Wis. 175, 177, 217 N.W. 743 (1928). Also see State v. Erickson, 53 Wis.2d 474, 476, 192 N.W.2d 872 (1972), where the court recognized the trial court's authority to refuse to accept a no contest plea because the offense was a felony with a possibility of imprisonment. At common law, there was apparently some dispute over the propriety of a no contest plea in cases involving imprisonment. There is now no doubt about the plea's suitability for even the most serious felonies. See State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928), and Hudson v. United States, 272 U.S. 451 (1926).

2. Guides to the exercise of discretion

Neither statutes nor case law identify the factors that are to guide the judge's exercise of discretion in deciding whether to receive a no contest plea. The practice in the state appears to vary widely. Some courts accept no contest pleas routinely without inquiring

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into the reasons for the plea. Other courts discourage no contest pleas by requiring that a rational explanation support the offer of the plea. Some courts routinely accept the pleas in misdemeanors but require a reason in felonies.

Section 971.06(1)(c) recognizes that a defendant may plead no contest "subject to the approval of the court." It is likely that the court "approval" referred to in the statute requires an exercise of discretion which weighs the plea in light of the public interest and the interests of justice. As with any exercise of discretion, this requires the court to consider proper factors, reach a conclusion, and explain the basis for the conclusion.

The specific factors that may be considered cannot be exhaustively listed and are likely to depend on the facts and circumstances of each case. One consideration may be whether the preference for a no contest plea is based solely on a factual dispute that is relevant only to possible future civil litigation and not to the criminal charge (e.g., the exact value of stolen property). Another consideration may be whether the no contest plea might affect the defendant's eligibility for postconviction treatment programs. Some programs for sex offenders, for example, require a complete admission of guilt, evidenced by a guilty plea, as a precondition for acceptance into the treatment program. See, for example, State v. Carrizales, 191 Wis.2d 85, 528 N.W.2d 29 (Ct. App. 1995), where a defendant who had entered a no contest plea was terminated from a sex offender treatment program because he would not admit committing the sexual assault upon which his conviction was based. Also see State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 579 N.W.2d 698 (1998) discussed below, making the same point with respect to Alford pleas.

Section 971.095(2) requires the district attorney to confer with victims "concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations." The statute does not specify whether the victim's interest should influence the decision to accept a no contest plea.

Statements made in the context of the no contest pleas, the plea itself, and the judgment resulting from the plea are all inadmissible in later civil actions. §§ 904.10, 908.03(22). By contrast, the guilty plea is admissible in later civil actions, and the criminal judgment based on a guilty plea is not excluded by the hearsay rule. § 908.03(22).

III. The Alford Plea

A. Description

In North Carolina v. Alford, 400 U.S. 25 (1970), the U.S. Supreme Court recognized the constitutionality of accepting a guilty plea even though the defendant maintains innocence. Alford's guilty plea to second degree murder allowed him to escape the death

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penalty that might have been imposed if he had been convicted of first degree murder after a trial. His plea was found to be constitutional because the record showed he knew what he was doing and that there was a strong factual basis for the plea.

The term "Alford plea" is now used to identify the situation where defendants plead guilty but maintain their innocence. The legitimacy of the plea in Wisconsin was first recognized in State v. Johnson, 105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1981). In State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), the Wisconsin Supreme Court reaffirmed that "the circuit courts of Wisconsin may, in their discretion, accept Alford pleas." The court noted that the plea gives the defendant a valuable option:

> A defendant may wish to plead guilty yet publicly maintain his innocence to avoid ridicule or embarrassment, such as where the charge is sexual assault of children. . . . Other times he might plead guilty while protesting his innocence because he does not think the jury will believe his claim of self-defense or accident.
> 192 Wis.2d 845, 857.

The court concluded that Alford pleas are acceptable as long as the defendant fully understands the consequences and the record shows the "strong evidence of guilt" that must support the plea. [See the discussion in section C., below.]

B. Effect

While statutes and case law address the effect of a no contest plea, there is no statutory authority describing the effect of the Alford plea. It seems logical to treat both pleas the same way.

1. An Alford plea supports a fully effective criminal conviction

There is no doubt that an Alford plea supports a fully effective criminal judgment. This is especially clear since a true Alford plea is a plea of guilty. [Cited with approval in State ex rel. Warren v. Schwarz, 219 Wis.2d 615, footnote 9, 579 N.W.2d 698 (1998).] Thus, the arguments for treating differently a conviction following a no contest plea (which have been rejected in the no contest situation) do not even apply to an Alford plea.

2. What rules apply to the collateral use of an Alford plea?

If a defendant enters a true Alford plea, that is, a guilty plea joined with a claim of innocence, what limits are there on the collateral use of the resulting conviction? It could be argued that because the plea is technically one of "guilty," that the special rules dealing with no contest pleas do not apply.

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Apart from the technical arguments that could be made, it appears to be the better practice to treat an Alford plea as a no contest plea for collateral purposes. The basis for treating a no contest plea differently than a guilty plea is the defendant's refusal to make a full admission of guilt. In an Alford plea, the defendant not only refuses to make a full admission of guilt but also expressly claims innocence. It would be illogical to restrict the collateral use of the no contest conviction, where there has been a limited admission of guilt, while placing no limits on the Alford conviction, where a claim of innocence has been made. .

Thus, the Alford plea conviction should be treated as follows:

1) the conviction is complete and unequivocal; it can be the basis for later repeater charges, suspension of a professional license, etc.
2) the plea is not an admission for collateral purposes;
3) statements made in connection with the plea are not admissible for collateral purposes; and
4) the conviction should be treated the same as a conviction following a no contest plea under sec. 908.03(22).

C. Acceptance Procedures

1. Guilty plea procedures apply

The rule for accepting Alford pleas is that regular guilty plea acceptance procedures apply, but special care must be taken. (See discussion below.)

The fact that an Alford plea is being submitted ought to be disclosed to the court as early as possible and usually is so disclosed. However, in a regular guilty plea case, the defendant may sometimes indicate hesitation about admitting guilt or may make statements that sound like claims of innocence. The court should fully explore such hesitation or statements, to assure that the defendant in fact understands what he or she is doing. A regular guilty plea should not be converted into an Alford plea without an express, unequivocal decision to that effect on the part of the defendant.

2. Special care is required

While Alford pleas are constitutionally acceptable and regular guilty plea procedures may be used, special care must be taken in two respects:

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- it must be clear that the defendant fully understands the charge and the effect of the plea; and
- there must be strong evidence of guilt.

a. The defendant's understanding

Alford held that a guilty plea may be accepted in the absence of an express admission of guilt if the defendant "voluntarily, knowingly, and understandingly consent[s] to the imposition of a prison sentence . . . [and] intelligently concludes that his interests require entry of a guilty plea." 400 U.S. 25, 37. The regular guilty plea acceptance procedures are already designed to assure that any guilty plea is voluntarily and intelligently made. However, in the Alford situation, it is recommended that the court address special questions to defendants to assure that they understand that if the plea is accepted, an unequivocal criminal judgment will be entered – a judgment that will allow imposition of the same penalties that could follow a regular guilty plea.

The court should also ask defense counsel to make a statement on the record to show that the nature and consequences of the Alford plea were thoroughly discussed with the defendant and what the defendant's understanding of that discussion was.

In State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), the court cited the preceding advice with approval:

> Competent counsel can easily explain the Alford plea. Moreover, defendants in Wisconsin are protected by procedural safeguards of sec. 971.08, Stats., and by material developed for the circuit courts by the Wisconsin Jury Instructions Committee specifically for Alford pleas. . . . [T]he Committee materials direct circuit judges to ask defense counsel on the record whether counsel has discussed the consequences of the plea with the defendant and if so, whether the defendant has expressed his understanding of those consequences.
> 192 Wis.2d 845, 858.

Further, the court added the following in a footnote:

> Although not required to make the plea acceptable, including a definition of an Alford plea on the guilty plea questionnaire may help to further document the defendant's understanding of the plea. We invite the Wisconsin Jury Instruction Committee to consider making such a change on the form.
> 192 Wis.2d 845, 860, at note 6.

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The following is included in the text of SM-32, Accepting A Plea of Guilty, to address these concerns:

> IF THE DEFENDANT ANSWERS "NO CONTEST" OR "ALFORD," THE COURT SHOULD ADDRESS THE DEFENDANT AND DEFENSE COUNSEL AS FOLLOWS:
>
> ["A plea of no contest means that you do not contest the state's ability to prove the facts necessary to constitute the crime."]
>
> ["An Alford plea is a guilty plea accompanied by a claim of innocence."]
>
> ["Do you understand that for the purposes of this proceeding, (a plea of no contest) (an Alford plea) will have the same effect as a plea of guilty? And that, if accepted, it will result in a conviction that carries the same character and force as a conviction resulting from a plea of guilty?"]
>
> ["Counsel, have you discussed the consequences of the plea with the defendant and do you believe the defendant understands them?"]
>
> b. "Strong evidence of guilt"

For all guilty pleas, a "factual basis" for the plea must be established. A precise evidentiary burden has never been assigned to "factual basis." The factual basis should be sufficient to satisfy the court that the defendant in fact committed the crime to which the plea is entered. § 971.08(1)(b). What it takes to so satisfy the judge will vary depending on the circumstances of each case, so the lack of a precise evidentiary standard is understandable.

With an Alford plea, the court must be satisfied that there is "strong evidence of actual guilt." North Carolina v. Alford, 400 U.S. 25, 37 (1970). This standard has been adopted in Wisconsin in State v. Johnson, 105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1981), where the court also observed that "'strong proof of guilt' to support an Alford plea is not the equivalent of proof beyond a reasonable doubt." 105 Wis.2d 657, 664. The Johnson holding was adopted by the Wisconsin Supreme Court in State v. Garcia, 192 Wis.2d 845, 858, 532 N.W.2d 111 (1995): ". . . the plea is acceptable where the trial court determines that strong proof guilt has been shown." "The requirement of a higher level of proof in Alford pleas is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's 'protestations' of innocence." State v. Smith, 202 Wis.2d 21, 27,

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549 N.W.2d 232 (1996). Also see State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 645, 579 N.W.2d 698 (1998).

The "strong proof of guilt" standard was applied in State v. Spears, 147 Wis.2d 429, 433 N.W.2d 595 (Ct. App. 1988), where a defendant had entered an Alford plea to two counts of what was then called second degree murder (now, first degree reckless homicide) and later attempted to withdraw the plea. The court cited the Johnson decision for two propositions: "strong proof" is not the equivalent of proof beyond a reasonable doubt; and, the inquiry is "whether the record 'indicates that a sufficient factual basis was established at the plea proceeding to substantially negate [the] defendant's claim of innocence.'" 147 Wis.2d 429, 435, citing State v. Johnson, supra, 105 Wis.2d 657, 664. [The Spears decision extensively discusses whether the "evidence" was sufficient to establish the "conduct evincing a depraved mind" element of old second degree murder. The majority and dissenting opinions disagree about whether "strong proof" of this troublesome element was presented, illustrating the difficulty in resolving the inherent contradiction presented by a guilty plea accompanied by a claim of innocence.]

c. "Heightened diligence" in sex offense cases

In State ex rel. Warren v. Schwarz, 219 Wis.2d 615 579 N.W.2d 698 (1998), the court called "for heightened diligence on the part of circuit courts in accepting Alford pleas—particularly in cases involving sex offenses . . . An inherent conflict arises when a charged sex offender enters an Alford plea: the offender cannot maintain innocence under the Alford plea and successfully complete the sex offender treatment program, which requires the offender to admit guilt." ¶72. The court added:

> ¶ 75. Should the circuit courts in their discretion decide to accept Alford pleas in such cases, we strongly advise them to give Alford-pleading defendants an instruction at the time of the plea that their protestations of innocence extend only to the plea itself, and do not serve as a guarantee that they cannot subsequently be punished for violating the terms of their probation which require an admission of guilt. Because of the unique nature of Alford pleas, circuit courts accepting such pleas should take extra care to ensure that defendants understand that in order to successfully complete the treatment program, they will be required to admit guilt. Such instructions will avert any misconceptions by defendants that the Alford plea provides any "promises" or "guarantees" of what is constitutionally appropriate probationary treatment. ¶ 75.

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D. Court Authority To Reject An Alford Plea

The Alford decision held that a guilty plea coupled with a claim of innocence was not unconstitutional. State v. Johnson and State v. Garcia both held that an Alford plea was not inconsistent with Wisconsin law relating to guilty pleas. However, Alford, Johnson, and Garcia do not require a court to accept an Alford plea.

1. Court approval is required

The Alford decision explicitly recognized that a trial court is not required to accept an Alford plea:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, see Lynch v. Overholser, 369 U.S., at 719, 8 L Ed 2d 220 (by implication), although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence. Cf. Fed. Rule Crim. Proc. 11, which gives a trial judge discretion to "refuse to accept a plea of guilty. . . ." We need not now delineate the scope of that discretion. 400 U.S. 25, 38, n.11.

Garcia reaffirmed that a "circuit court may reject the plea if it concludes that the plea is contrary to the public interest or the interests of justice." 192 Wis.2d 845, 859 (citing this Special Material with approval). A concurring opinion by Justice Abrahamson advised circuit courts to seek "to resolve the conflict between the waiver of trial and the claim of innocence." 192 Wis.2d 845, 868. A concurring opinion by Justice Wilcox concluded that "an Alford plea is a troubling way to finalize the criminal judicial process. I recommend that the trial courts in this state act with great reticence when confronted with an Alford plea."
192 Wis.2d 845, 868.

2. Guides to the exercise of discretion

Wisconsin has not chosen to limit the court's authority to accept or reject Alford pleas. Thus, the trial judge confronted with an Alford plea is entitled to exercise discretion in deciding whether to accept it. In many respects, this exercise of discretion will be like that involved in deciding whether to accept a no contest plea (see discussion above).

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A refusal to accept an Alford plea should be supported by a clear statement of the factors that persuaded the court to exercise its discretion in that manner. In State v. Williams, 2000 WI App 123, 237 Wis.2d 591, 614 N.W.2d 11, the court of appeals implied that a judge's flat refusal to accept an Alford plea because "I have just made a policy that I will not accept one" would be error. However, the alleged error was considered waived in that case.

COMMENT

SM-32A was originally published in 1985 and revised in 1995. This revision was approved by the Committee in April 2019; it provided a general updating.

The primary changes made in the 1995 revision were those reflecting the decision of the Wisconsin Supreme Court in State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995).

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SM-32B ACCEPTING A PLEA OF GUILTY: USE OF WRITTEN FORM

The following questions are suggested for use when a written form is employed to furnish a record that a plea is made voluntarily and understandingly.

Many courts have developed written forms for accepting guilty pleas. A sample form is provided as Appendix I to this Special Material. It includes all the questions that are included in the full oral acceptance procedure recommended in SM-32.

The use of a written form was approved in State v. Moederndorfer, but the court added that the trial court should personally question the defendant concerning the form. The court referred to "making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one."[1]

The sample questions that follow are intended to comply with the Moederndorfer decision. Also included are questions to be directed at defense counsel.

THE COURT TO THE DEFENDANT:

(Mr.) (Ms.) _____, I have here a form entitled (state caption on form). It appears to have your signature on the last page (and your initials on each paragraph).

1. Did you sign and initial this form?
2. When did you do that?
3. Have you read the form?
4. Do you believe you understand what is in the form?
5. Do you have any questions about it?
6. Have you used any drugs, alcohol, or medication today?

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[AT THIS POINT REVIEW THE FORM AND FOLLOW UP ON ANY ITEMS THAT MAY RAISE A QUESTION ABOUT THE UNDERSTANDING OF THE PLEA]

7. Did you talk this over with your lawyer?

8. Did you discuss what is in this form and what is being recommended here?

9. Do you understand that by pleading guilty you are giving up the constitutional rights detailed in the form?

10. Did you have enough time to talk with your lawyer?

11. Do you have any questions now about the form or about your plea of guilty?

THE COURT TO DEFENSE COUNSEL:

12. (Mr.) (Ms.) _____, as the lawyer for the defendant, have you had ample opportunity to confer with the defendant with regard to this plea of guilty?

13. Have you reviewed the (state caption on form) with the defendant?

14. Are you satisfied that the defendant understands the charge(s), the elements thereof, and the possible consequences of an adjudication of guilt?

15. And, are you satisfied the defendant is knowingly, intelligently waiving (his) (her) constitutional rights?

[16. And are you satisfied that the defendant understands the enhanced penalty that can be imposed if the court accepts the plea(s) of guilty as a repeater?]

17. Based upon your own independent investigation, are you satisfied that there is an ample factual basis to warrant the court's acceptance of the tendered pleas?

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THE COURT TO THE DEFENDANT:

18. (Mr.) (Ms.) _____, you have heard what your lawyer has told me. Is there anything that you wish to disagree with or ask questions about?

19. Are you satisfied with the representation you received from your lawyer up to this point?

20. And is there anything that I may have asked you that you now upon reflection wish to modify or change in any way?

21. Do you want the court to accept your plea(s) of guilty at this time?

COMMENT

Special Material 32B was originally published in 1985. This revision was approved by the Committee in August 1992.

1. The use of a written plea acceptance form was approved in State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987):

> Personal colloquy by verbally following the provisions of SM-32 is not mandatory. The trial court may instead refer to some portion of the record or some communication between defense counsel and defendant. Any one of these alternatives is proper so long as the alternative used exhibits defendant's knowledge of the constitutional rights waived.

141 Wis.2d 823, 827

The court found that the written form used in the case was sufficient, that the court conducted a full personal inquiry about the defendant's understanding of the form, and that there is nothing inherently wrong about using a form — to the contrary, using a form may be preferable:

> People can learn as much from reading as listening, and often more. In fact, a defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting. A trial court can accurately assess a defendant's understanding of what he or she has read by making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one.

141 Wis.2d 823, 828

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A guilty plea was vacated despite the use of a written form in State v. Hansen, 168 Wis.2d 749, 485 N.W.2d 74 (Ct. App. 1992). The defect was the trial court's failure to address the defendant personally to ascertain his understanding of the constitutional rights being given up by the guilty plea:

> . . . the colloquy was limited to whether Hansen had gone over the Moederndorfer form with his attorney before he signed it and whether Hansen understood the form. We conclude that such limited personal colloquy is not the substantive kind of personal exchange between the trial court and the defendant which Bangert, sec. 971.08, Stats., and Moederndorfer require.
>
> While our approval of the Moederndorfer form certainly lessened the extent and degree of the colloquy otherwise required between the trial court and the defendant, it was not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding that the plea results in the waiver of the applicable constitutional rights. The record made in Moederndorfer is demonstrative. Although the personal colloquy there was also brief, it nonetheless established the defendant's understanding that, by entering the plea, he was giving up the rights detailed in the form. Moederndorfer, 141 Wis.2d at 828-29 n.1, 416 N.W.2d at 630. This is a subtle, but important, requirement.

168 Wis.2d 749, 755-56

Question number 9 above is believed to satisfy the Hansen requirement.

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APPENDIX I GUILTY PLEA ACCEPTANCE FORM

[SPECIAL MATERIAL WITHDRAWN]

COMMENT

This Special Material was originally published as SM-32B in 1985. It was revised and published as SM-32B APPENDIX in 1992 and revised in 1995. Its withdrawal was approved by the Committee in 2019.

The use of court form CR-227 is now required for plea acceptance.

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SM-33 INFORMATION ON POSTCONVICTION RELIEF

[WITHDRAWN]

COMMENT

SM-33 was originally published in 1974 and revised in 1980, 1981, 1982, 1983, and 1985. It was withdrawn by the Committee in 2010.

See § 973.18 and the form adopted by the Judicial Conference: CR-233 Notice of Right to Seek Postconviction Relief. Section 971.025(1) provides: "In all criminal actions proceedings . . . the parties and court officials shall use the standard court forms adopted by the judicial conference under s. 758.18."

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SM-33A INSTRUCTION TO BE USED ON DENIAL OF ANY POSTCONVICTION MOTION (OTHER THAN § 974.06)

[WITHDRAWN]

COMMENT

SM-33A was originally published in 1974 and revised in 1980 and 1981. It was withdrawn by the Committee in October 1991.

The Committee withdrew this special material for several reasons: giving such advice is not required by case law or statute; appellate procedure is sufficiently technical that it is difficult to give complete and accurate information to a defendant; and, probably because of the preceding reasons, the advice was apparently rarely, if ever, used.

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SM-33B INSTRUCTION TO BE USED ON DENIAL OF A POSTCONVICTION MOTION UNDER § 974.06

[WITHDRAWN]

COMMENT

SM-33B was originally published in 1974 and revised in 1980 and 1981. It was withdrawn by the Committee in October 1991.

The Committee withdrew this special material for several reasons: giving such advice is not required by case law or statute; appellate procedure is sufficiently technical that it is difficult to give complete and accurate information to a defendant; and, probably because of the preceding reasons, the advice was apparently rarely, if ever, used.

The situation addressed by this special material is even more complex because the § 974.06 motion is considered civil in nature. § 974.06(6) Thus, the relevant rules are as follows:

- § 809.30(2)(L) provides that appeals under § 974.06 are governed by the procedures for civil appeals.
- § 808.04(1) states the general rule for civil appeals: 45 or 90 days, depending on whether written notice of the order denying relief was received.
- § 808.04(5) provides a special 120-day rule for "a person imprisoned on a criminal sentence against whom a civil final judgment or order is rendered."

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SM-34 SENTENCING PROCEDURE, STANDARDS, AND SPECIAL ISSUES

This Special Material outlines the procedures and standards recommended for use at sentencing. It also discusses several issues of importance to sentencing.

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I. The Basic Requirements for the Sound Exercise of Discretion

In McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971), the Wisconsin Supreme Court held that a trial judge, when imposing a sentence upon a defendant, must on the record explain the reasons for the imposition of the particular sentence given as well as outline on the record the basic facts relied upon or taken into consideration during the sentencing deliberations.

As the McCleary court said at page 281, ". . . requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed." The court then went on to say that a trial judge must ". . . state the facts on which he predicates his judgment, and . . . give the reasons for his conclusion." [1]

The sound exercise of discretion requires the consideration of a variety of factors (see the discussion at page 4, below). Of these, the primary factors "are the gravity of the offense, the character of the offender, and the need for protection of the public." Elias v. State, 93 Wis.2d 278, 286 N.W.2d 559 (1980). "In other words, a 'sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors.'" State v. Halbert, 147 Wis.2d 123, 128, 432 N.W.2d 633 (Ct. App. 1988), citing In re Judicial Administration: Felony Sentencing Guidelines, 120 Wis.2d 198, 201, 353 N.W.2d 793 (1984).

The sentencing court must not approach the sentencing "with an inflexibility that bespeaks a made-up mind," as shown by a trial court's statement that it never granted probation for drug offenses. State v. Halbert, supra at 128, citing State v. Martin, 100 Wis.2d 326, 302 N.W.2d 58 (Ct. App. 1981). Considering the sentencing decision before the sentencing hearing and reaching tentative conclusions about the sentence does not violate these principles. State v. Varnell, 153 Wis.2d 334, 450 N.W.2d 524 (Ct. App. 1989).

The cases attempting to articulate a rule against a "mechanistic sentencing approach," while technical to some extent, reflect an underlying sentencing principle of great importance. Making it clear that the sentencing court has considered all the facts of the individual case is extremely important to giving defendants, victims, and the public the sense that they have been treated fairly.

II. Sentencing Standards

A judge should always tailor the sentence to fit the particular circumstances of the case and the individual characteristics of the defendant. There are certain standards, however, which should be followed by the judge when deciding on a sentence.

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A. The Minimum Amount of Confinement

In Neely v. State, 47 Wis.2d 330, 334, n. 8, 177 N.W.2d 79 (1970), and again in McCleary v. State, supra at 276, the Wisconsin Supreme Court quoted with approval Standard 2.2 of the ABA Standards Relating to Sentencing Alternatives and Procedures, which states:

> The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.[2]

Further, in Bastian v. State, 54 Wis.2d 240, 247-49, n.1, 194 N.W.2d 687 (1972), the Wisconsin Supreme Court expressly adopted Standard 1.3 of the ABA Standards Relating to Probation:

> Criteria for granting probation.
>
> (a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
>
> (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.
>
> (b) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.[3]

B. Repeal of the Wisconsin Sentencing Guidelines

Wisconsin employed a system of advisory sentencing guidelines from 1985 through 1995. 1995 Wisconsin Act 27 repealed the statutes that referred to the Sentencing Commission and the sentencing guidelines [§§ 15.104(17), 973.01, and 973.011-.012, 1993 Wis. Stats., were all repealed with an effective date: July 29, 1995.]

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C. Factors to Consider

When imposing a sentence, judges should first outline on the record the basic facts taken into consideration in the sentencing deliberations. In State v. Tew, 54 Wis.2d 361, 367-68, 195 N.W.2d 615 (1972), the Wisconsin Supreme Court listed some of the factors which may be properly considered in sentencing:

- a past record of criminal offenses;
- a history of undesirable behavior patterns;
- the defendant's personality, character, and social traits;
- the results of a presentence investigation;
- the vicious or aggravated nature of the crime;
- the degree of the defendant's culpability;
- the defendant's demeanor at trial;
- the defendant's age, educational background, and employment record;
- the defendant's remorse, repentance, and cooperativeness;
- the defendant's need for close rehabilitative control; and
- the rights of the public.

Several additional factors have been recognized as appropriate considerations by case law or statutes:

- the effect of the crime on the victim (including rehabilitative needs);[4]
- the victim's statement (see § 972.14(3) discussed below);
- juvenile record;[5]
- read-ins;[6]
- false testimony during trial;[7]
- failure to name accomplice after disclosure of existence of co-conspirator;[8] and
- conduct relating to charges for which the defendant was acquitted.[9]

There are a number of factors that are not to be considered in imposing sentence:

- exercise of constitutional rights, such as the right to a trial,[10] the privilege against self-incrimination,[11] or the right to present a defense;[12]
- beliefs and associations protected by the First Amendment, unless a reliable connection is established between the criminal conduct and those beliefs and associations;[13]
- refusal to admit guilt;[14] and
- the amount of credit that will be due for pretrial confinement.[15]

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The list of proper and improper factors suggests a potentially elusive distinction relating to the general proposition that it is proper to give favorable consideration to the remorse and cooperation that accompany a plea of guilty. The same principles that forbid penalizing the defendant for going to trial instead of pleading guilty, or for presenting a good faith, though unsuccessful, defense, are recognized as prohibiting the imposition of a harsher sentence solely because the defendant refuses to admit guilt. Thus, the defendant can be rewarded for showing remorse but is not to be penalized for refusing to admit guilt. This distinction was directly addressed by the Wisconsin Supreme Court in Scales v. State, 64 Wis.2d 485, 219 N.W.2d 286 (1974). In Scales, the court acknowledged that a posttrial confession of guilt and an expression of remorse may be considered in mitigation of sentence but held that it does not follow that lack of remorse may properly be considered as a basis for an increased sentence. If the defendant has chosen to exercise the right against self-incrimination, the defendant may not be penalized for it, even after a jury's determination of guilt.[16]

D. Standards for Consecutive Sentences

Section 973.15(2) provides in part that "the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously." Specific standards for deciding when sentences on multiple counts should be ordered to run consecutively to one another are not further addressed in the statutes and have not been adopted by the appellate courts. A summary of the law is provided in State v. Johnson, 178 Wis.2d 42, 51-2, 503 N.W.2d 575 (Ct. App. 1993):

> . . . [M]ore than fifteen years ago the supreme court "recommended" that the ABA standards for consecutive sentencing "be given consideration as a guideline" in Wisconsin. But the court has never pursued the matter further; indeed, it has repeatedly declined to adopt the standards. . . . [citations omitted]
>
> . . . thus, under existing law, whether to impose consecutive, as opposed to concurrent, sentences is, like all other sentencing decisions, committed to the trial court's discretion.

There are a variety of technical constraints applicable to the imposition of consecutive sentences, most arising when periods of probation are also involved. Section 973.15(2)(a) provides that the court may provide that a sentence may be ordered to be consecutive "to any other sentence imposed at the same time or previously." Problems arise because ordering a term of probation has not been considered a "sentence." State v. Maron, 214 Wis.2d 384, 571 N.W.2d 454 (Ct. App. 1997); Prue v. State, 63 Wis.2d 109, 216 N.W.2d 43 (1974). Thus, for example, a term of imprisonment may not be made

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consecutive to a term of probation or to jail time served as a condition of probation. See State v. Maron, 214 Wis.2d 384, 394-5, and cases cited therein.

III. The Presentence Investigation Report

The presentence investigation report is not only of great value at sentencing, but also plays an important role after sentence is imposed. If the defendant is placed on probation, the report becomes the probation agent's primary source of information. The agent will use the report in determining what special conditions of supervision to impose and in determining what level of supervision is required. If the probationer violates the conditions of supervision, the information in the report may also influence the decision whether or not to pursue revocation proceedings.

If the defendant is sentenced to imprisonment or is incarcerated after probation revocation proceedings, the presentence report becomes part of the person's correctional treatment file and is consulted by corrections staff whenever decisions are made about how the person will serve the sentence and what the conditions of confinement will be. Decisions about security classification, institutional assignment, job assignment, and eligibility for educational, vocational, and treatment programs, are made with reference to the presentence report.

Perhaps most importantly, the presentence report becomes part of the file consulted by the parole board when parole release decisions are made. Even after the person is released on parole, the report may be used by the parole agent in determining conditions of parole, the level of supervision, and the need for pursuing revocation proceedings.

A defendant has the due process right to be sentenced on the basis of true and correct information and the presentence report is the primary means of communicating this information to the court. But neither due process nor the right to counsel under the 5th or 6th Amendment requires that counsel be allowed to be present when the defendant is interviewed by the presentence preparer. State v. Perez, 170 Wis.2d 130, 487 N.W.2d 630 (Ct. App. 1992) [re: a due process claim]; State v. Knapp, 111 Wis.2d 380, 330 N.W.2d 242 (Ct. App.), cert. denied, 464 U.S. 834 (1983) [re: a 5th and 6th Amendment claim].

A. When to Order a Presentence Report

Wis. Stat. § 972.15(1) provides that after conviction, the court may order a presentence investigation, "except that the court may order an employe of the department to conduct a presentence investigation only after a conviction for a felony." Although this statute gives a trial court discretion not to order a presentence report in any particular case, the Wisconsin Supreme Court has urged and encouraged trial courts to use this sentencing aid. See Bruneau v. State, 77 Wis.2d 166, 174, 252 N.W.2d 347 (1977). The ABA Standards

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for Criminal Justice call for a presentence investigation and report in the following circumstances:

> . . . where incarceration for one year or more is a possible disposition, where the defendant is less than twenty-one years old, or where the defendant is a first offender, unless the defendant or defense counsel waives production of the report and the court specifically finds that it has sufficient information to exercise the discretion accorded to it.

Standard 18-5.1(b).

B. Defense Access to the Presentence Report

Section 972.15(2) provides:

> When a presentence investigation report has been received the judge shall disclose the contents of the report to the defendant's attorney and to the district attorney prior to sentencing. When the defendant is not represented by an attorney, the contents shall be disclosed to the defendant.

There has been disagreement about whether this statute required that the presentence report be personally disclosed to the defendant. Counsel clearly had the obligation to review the report with the defendant, but in some courts there was reluctance to disclose the report for the defendant's direct review. This situation has been clarified by the decision of the Wisconsin Court of Appeals in State v. Skaff, 152 Wis.2d 48, 447 N.W.2d 84 (Ct. App. 1989). The court held that § 972.15(2) should not be read to deny access to the represented defendant: "the legislature could not have intended that a defendant appearing without counsel had greater rights to his PSI than a defendant who appeared with counsel." 151 Wis.2d 48, 57. The court went beyond the statutory grounds, however, to hold that access is guaranteed by constitutionally-based due process considerations: "to deny Skaff timely access to his PSI, pursuant to court order, is to prejudicially deny him an essential factor of due process, i.e., a procedure conducive to sentencing based on correct information." 151 Wis.2d 48, 57.

The importance of defense review of the presentence report was emphasized in State v. Anderson, 222 Wis.2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998), where a case was remanded to the trial court for resentencing based on ineffective assistance of counsel:

> . . . Anderson disputed the important and relevant portions of PSI. Having done that, it was trial counsel's further duty to see that the accuracy of those matters was fully resolved by a proper hearing. Counsel did not do this. As

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a result, the trial court relied on certain of these disputed portions of the PSI without first resolving the accuracy of the allegations. We hold that Anderson was prejudiced by this process.

C. Discovering Errors in the Report

Defense counsel will often bring alleged errors in the report to the court's attention. If that is not done, the Committee believes that the court should ask counsel whether any errors were discovered. It should be counsel's responsibility to review the report carefully and thoroughly with the defendant to determine whether it contains errors that could be prejudicial to the defendant either at sentencing or in the correctional process.

D. Correcting the Inaccurate Report

If the importance of the presentence report after sentencing is acknowledged, and if one purpose of allowing the defendant access to the report is to afford the chance to discover and correct inaccuracies, it follows that any errors found in the report should be corrected. It may require some care and follow-through to assure that corrections are actually made. A simple statement from the court that certain information is in error and will not be relied upon is usually not sufficient to achieve actual correction of the report. Multiple copies are likely to be in existence and it may be advisable for the court to order directly that all copies be corrected in the manner designated by the court.

IV. Explaining the Sentence; a Suggested Format

A. In General

Before pronouncing sentence, the court must make two inquiries relating to the rights of victims at sentencing: the inquiry of the district attorney described in § 972.14(2m); and a determination whether a victim wishes to make a statement to the court. These obligations are discussed in Section V., below.

Pronouncing sentence typically begins by setting forth the factors considered on the record; the judge should then, based on these facts, explain and give reasons for the <u>type</u> of sentence or custody imposed upon the defendant. Ordinarily, the type of sentence or custody will consist of either probation, a fine, common jail confinement with or without Huber privileges, or imprisonment. The judge should explain why the type of sentence or custody imposed is deemed appropriate and why a less severe sentence is considered inappropriate.

Lastly, the judge should explain and give reasons for the <u>length or duration</u> of the custody imposed and the amount of the fine if a fine is part of the disposition. For

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example, if a maximum prison sentence is imposed, the judge should explain why the maximum sentence is appropriate and why a sentence of a lesser number of years is considered inappropriate. The justification for the length of the sentence should always be set forth in the record, as well as the reasons for not imposing a sentence of lesser duration.

B. A Sentencing Format

The Committee believes that the requirements relating to the sound exercise of sentencing discretion can be carried out effectively if a format like the following is used to explain the court's sentencing decision.

Judges often rely on notes in preparing for sentencing and in articulating the rationale for the sentence imposed. Parties are not entitled to access to these notes in the context of postconviction proceedings.[17]

Before pronouncing sentence, the court should have made the inquiry of the district attorney described in § 972.14(2m) and ascertained whether a victim wishes to make a statement [discussed below]. The defendant and defense counsel should have reviewed the presentence report and the court should have asked whether there are any errors in the presentence report or any omissions of significant material. The oral pronouncement of sentence should then include the following:

1. Identify the offense or offenses for which sentence is to be imposed.
2. Identify the maximum penalty, including any penalty enhancers.
3. Identify the recommendations of the prosecutor, defense counsel, and the presentence report.
4. Identify information relating to impact of the crime on the victim.
5. Explain the general objectives that a criminal sentence may address:
   - protection of the community
   - punishment
   - rehabilitation of the defendant
   - deterrence of others
6. Identify the general objectives of greatest importance in this case.
7. Identify the factors that were considered in arriving at the sentence and indicate how they influenced the decision.
8. If probation is rejected, indicate why.
9. Conclude with the statement that based on all these factors, the designated sentence is imposed, stating clearly:
   - what the term of years is

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- how the sentence relates to other sentences imposed at the same time or previously (concurrent or consecutive)
- the number of days sentence credit due under § 973.155

10. Inform the defendant of the restrictions on firearm possession under § 941.29.[18]
11. If applicable, inform the defendant of the restrictions on child sex offenders working with children under § 973.034[19] and sex offender reporting requirements under § 973.048.[20]
12. Advise the defendant of the right to seek postconviction relief.[21]

At the conclusion of the sentencing proceeding, the court should assure that the judgment of conviction accurately reflects the sentence imposed.

C. A Sample Sentencing Pattern

The following is a sentencing pattern that, in the Committee's judgment, employs a logical and complete sequence in covering all the essential steps in the sound exercise of sentencing discretion.

In the case of State versus _____, Case No. _____, the defendant has been convicted of the crime of _____ upon a (guilty verdict by the jury) (trial by the court) (plea of guilty). Defendant is now before the court for the purposes of sentencing.

The maximum penalty for _____ is _____. The presentence author recommends _____. The defendant requests _____.

On sentencing the following witnesses for the state appeared: _____ _____. The following witnesses for the defense appeared: _____ _____. (Identify letters or other material submitted to the court.) (Identify information relating to impact of the crime on the victim.) (No corrections to the presentence report were noted.) (Corrections to the presentence report are as follows: _____.)

(State summary of the offense.)

In deciding the defendant's sentence (disposition), the court considers the following:

(A) Seriousness of the offense
1. Dangerousness — actual/potential
2. Injuries
3. Effects of the crime — temporary/permanent
4. Amounts involved

(B) Character of the defendant
1. Age, education, and health of defendant
2. Record — juvenile record, adult record, and pending charges
3. Status — married, children
4. Demeanor, remorse, personality, truthfulness (defendant as a witness)

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(C) Needs of society
1. Is defendant good risk?
2. Does community need protection?
3. Deterrent effect of sentence
4. Moral need for punishment

(a) You are hereby sentenced to the Wisconsin State Prisons for an indeterminate period not more than _____ years, or

(b) You are hereby sentenced to the Wisconsin State Prisons for an indeterminate term not more than _____ years, stayed for _____ years during which time you are on probation with the following terms.

(c) Sentence is withheld and you are hereby placed on probation for a period of _____ years under the following conditions.

Fine, if any, costs, and surcharges.

_____ is entitled to sentence credit under § 973.155 in the amount of _____ days. _____ is ordered to pay restitution in the amount of _____.

For felonies, advise the defendant that § 941.29 makes it a Class E felony for a person convicted of a felony to possess a firearm.[22]

If applicable, inform the defendant of the restrictions on child sex offenders working with children under § 973.034 and sex offender reporting requirements under § 973.048.[23]

Advise on the right to seek postconviction relief.[24]

V. Victim Participation in Sentencing

Considering the impact of the crime on the victim and allowing the victim to address the court are mandatory. Article I, § 9 of the Wisconsin Constitution provides in part that "This state shall ensure that crime victims have . . . the opportunity to make a statement to the court at disposition. . ." This right is implemented by two statutes imposing obligations on the court. One obligation is to inquire of the district attorney; the other obligation is to determine whether victims wish to provide information to the court.

A. Obligation to Inquire of the District Attorney

This obligation is imposed by § 972.14(2m), which reads as follows:

> Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with s. 971.095(2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing.

The reference to "s. 971.095(2)" is to the general duty of the district attorney to offer all victims "who have requested the opportunity an opportunity to confer with the district attorney concerning the

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prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations." The reference to "sub. (3)(b)" is to § 972.14(3)(b), which requires the district attorney to "make a reasonable attempt" to contact victims and inform them of their right to make a statement at sentencing.

Complete compliance with these obligations can, in the Committee's judgment, be achieved by asking the following questions of the district attorney:

- whether he or she has complied with the victim notice and consultation law — § 971.095(2); and

- whether he or she has made a reasonable attempt to contact victims of a crime to be considered at sentencing* to inform them of their right to make a statement in court or to submit a written statement to be read in court. [As required by § 972.14(3)(b)]; and

- whether any of the victims of a crime to be considered at sentencing requested notice of the date, time, and place of the sentencing hearing; and, if so,

- whether he or she provided to the victim notice of the date, time, and place of the sentencing hearing.

*"Crime considered at sentencing" is defined in § 972.14(1)(ag) as "any crime for which the defendant was convicted and any read-in crime. . . ."

B. Court Determination Whether Victims Wish to Provide Information

The second obligation is imposed by § 972.14(3)(a), which provides:

> Before pronouncing sentence, the court shall determine whether a victim of a crime considered at sentencing wants to make a statement to the court. If a victim wants to make a statement, the court shall allow the victim to make a statement in court or to submit a written statement to be read in court. The court may allow any other person to make or submit a statement under this paragraph. Any statement under this paragraph must be relevant to the sentence.

Compliance with this obligation can, in the Committee's judgment, be achieved by addressing all those present in the courtroom and:

- asking whether any victim of a crime considered at sentencing wants to make a statement to the court; and

- stating that if a victim wants to make a statement, the court will allow an oral statement in court or the submission a written statement.

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The application of § 972.14(3)(a) was originally limited to felony cases; that restriction was repealed by 1995 Wisconsin Act 77 [effective date: July 1, 1996].

Subsection (1)(b) of § 972.14 provides a cross-reference for the definition of "victim." "Victim" has the meaning provided in § 950.02(4), which is: "a person against whom a crime has been committed."

As the statute clearly states, the victim (or the victim's family member in a homicide case) must be allowed to make a statement at sentencing. The only limitation on the statement is that the statement must be relevant to the sentence. One type of information that appears clearly to be relevant is that relating to the impact of the crime on the victim or the victim's family.

First, "the vicious or aggravated nature of the crime" has long been considered to be one of the factors properly considered at sentencing. State v. Wells, 51 Wis.2d 477, 187 N.W.2d 328 (1971).

Further, several statutes allow, or even require, the court to consider victim impact information. One of the specified rights in § 950.04, titled, "Basic Bill of Rights for Victims and Witnesses," is that found in subsection (2m):

> To have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim of a felony and have the information considered by the court.

This right is implemented by two other provisions. Section 972.15, relating to the presentence report, includes subsec. (2m), which reads as follows:

> The person preparing the presentence investigation report shall attempt to contact the victim to determine the economic, physical and psychological effect of the crime on the victim. The person preparing the report may ask any appropriate person for information. This subsection does not preclude the person who prepares the report from including any information for the court concerning the impact of a crime on the victim.

The implementation is completed by subsec. (4) of § 973.013, which provides that "[i]f information under § 972.15(2m) has been provided in a presentence investigation report, the court shall consider that information when sentencing the defendant."

It is possible for sentencing proceedings to become highly emotional and for victim impact statements to contribute to that situation. To minimize potential problems, it may be helpful to remind those speaking on the victim's behalf that their comments are to be directed to the court, not to the defendant, and are to be delivered with due respect to the dignity and formality of the proceedings.

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Consideration of victim impact information was challenged in State v. Horn, 126 Wis.2d 447, 461 (1985), where the defendant characterized it as "irrelevant, inflammatory and prejudicial." The court of appeals held there was no abuse of discretion in considering the victim impact information, noting that it is specifically authorized by § 972.15. Also see State v. Jones, 151 Wis.2d 488, 444 N.W.2d 760 (Ct. App. 1989), holding that it is appropriate to consider the "rehabilitative needs of the victim" in imposing sentence. It is not error for the presentence report to go beyond impact information and refer to victims' wishes as to the specific sentence to be imposed; but, like recommendations from other sources, they will be accepted only if the court "can independently conclude that the recommended sentence is appropriate in light of the acknowledged goals of sentencing as applied to the facts of the case." State v. Johnson, 158 Wis.2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990).

The United States Supreme Court has considered the use of victim impact information in two death penalty cases. In Booth v. Maryland, 482 U.S. 496 (1987), the court held that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence. Booth was overruled in Payne v. Tennessee, 501 U.S. 808 (1991):

> Victim impact statement is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. . . .
>
> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.

The Booth decision had not been applied to noncapital cases by the United States Supreme Court and the Wisconsin Court of Appeals has explicitly declined to extend Booth to noncapital cases. See State v. Scherreiks, 153 Wis.2d 510, 451 N.W.2d 759 (Ct. App. 1989). With its overruling by Payne, the Booth rationale clearly has no application to Wisconsin sentencing practice.

VI. The Defendant's Presence and Right to Allocution

Section 971.04(1)(g) provides that the defendant shall be present at "the pronouncement of judgment and the imposition of sentence." In State v. Koopmans, 210 Wis. 2d. 670, 563 N.W.2d 528 (1997), the court held that this provision is mandatory and nonwaivable in felony cases. It requires the defendant's presence at sentencing even if the defendant was present at the beginning of the trial

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but was voluntarily absent without permission of the court thereafter. See § 971.04(3). Subsection (2) of § 971.04 allows a defendant in a misdemeanor case to be excused from attendance at any or all stages of the proceedings, including sentencing. But the misdemeanor defendant may be excused only "with leave of the court," indicating this is a discretionary decision on the part of the trial judge.

Section 972.14(2) provides that before pronouncing sentence, the court shall afford the "defendant an opportunity to make a statement with respect to any matter relevant to sentence." It is important to afford defendants this right because it may be the only time during the entire proceeding when they have the chance to relate their side of the story. Along these lines, courts should be alert for statements made during "allocution" that may indicate that a guilty plea was not knowingly made. For example, assume that a defendant who has entered a guilty plea to burglary as a party to the crime states at sentencing that he should be given some leniency because he was asleep in the back seat of the car at the time of the crime and did not know his friends planned to commit a burglary. This indicates that the defendant did not understand the facts necessary to constitute the crime of burglary and casts doubt on the validity of the plea. This should have come up at the time the plea was accepted, but the opportunity for allocution may lead defendants to be more forthcoming about how their actions match up with the charge, and courts should be alert for statements at sentencing that cast doubt on the plea.

VII. Sources and Accuracy of Information

Subject to the general limitation that proper factors be considered, the sentencing court may rely on a broad range of information. Two of the potential problems that may arise represent opposite sides of the same coin: attempts by the parties to withhold information and attempts by nonparties to bring information to the judge's attention. An additional question is whether unconstitutionally obtained evidence may be considered.

A. Information from Nonparties

Recent developments emphasize the propriety of affording the victim a chance to be heard at sentencing, but what about unsolicited advice from persons not directly concerned with the criminal case? A common manifestation of this problem is the correspondence people sometimes direct to the sentencing court. The Committee recommends that all correspondence of this type be filed and disclosed to the prosecutor and defense. The court should clearly indicate whether or not the information was relied on when sentence is imposed.

B. Plea Agreements Relating to Sentencing Information or Advocacy

Plea agreements relating to sentence recommendations are apparently quite common. For example, the defendant may agree to plead guilty to a crime with a 10-year maximum penalty in return for the prosecution agreement to recommend a sentence of 5 years. These agreements are considered to be legitimate as long as the defendant understands that the prosecutor's recommendation is not binding on the sentencing judge.

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Recent Wisconsin cases illustrate a related type of plea agreement, one where the prosecutor agrees "not to oppose" a particular sentence or "to remain silent" at sentencing. The danger with these agreements is that they may result in concealing from the sentencing judge information which is highly relevant to sentencing. Wisconsin appellate courts have made it clear that it is improper to conceal relevant information from the sentencing judge and that plea agreements which purport to do so are invalid because they are contrary to public policy. A recent case illustrating this situation is State v. McQuay, 154 Wis.2d 116, 452 N.W.2d 377 (1990) [reversing 148 Wis.2d 823, 436 N.W.2d 905 (Ct. App. 1989)]. McQuay entered an "Alford" plea to 5 counts of sexual assault. The plea agreement called for the dismissal of 24 other sexual assault charges and further provided that they would not be considered at sentencing. The presentence report, however, contained 10 pages of information on the dismissed charges. The sentencing judge said he did not consider the 24 other charges, but noted that if he could "there wouldn't be enough years for this Court to give you." McQuay challenged the sentence on appeal, claiming the plea agreement was breached when the presentence report contained information on the dismissed charges. The court of appeals vacated the judgment on the grounds that the plea agreement not to reveal relevant information to the sentencing judge was void — it is "against public policy and cannot be respected by the courts." 148 Wis.2d 823, 826.

The Wisconsin Supreme Court reversed, disagreeing with the factual conclusion that the agreement had called for withholding information from the judge. The supreme court read the agreement as a promise by the prosecutor to recommend to the sentencing court that it not consider the dismissed counts in imposing sentence. As such, it was a valid agreement and was not breached. The supreme court did not disagree with the court of appeals' legal conclusion that an agreement to withhold information is void as against public policy.

State v. Jorgensen, 137 Wis.2d 163, 404 N.W.2d 66 (Ct. App. 1987), illustrates the same problem with respect to a plea agreement that called for the state to "remain silent" at sentencing. At the sentencing hearing, the prosecutor interrupted defense counsel to call attention to a "factual discrepancy" in defense counsel's description of the facts of the offense. The court of appeals found that this statement was not a breach of the plea agreement and also held that any plea agreement that would call for the prosecutor to remain silent, regardless of the accuracy of statements made at sentencing, would be unenforceable as violating public policy. [Also see State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987): plea agreement to remain silent was not breached when state corrected the defendant's misstatement about the disposition of a codefendant's case.]

The general rule is clear: the parties cannot agree to limit the information the sentencing judge will consider.

Another problem with agreements calling for the prosecutor to remain silent is the difficulty in determining whether the agreement is complied with when information is provided by another government-related source. For example, what if the prosecutor remains silent but the presentence report recommends a harsh sentence? This problem may relate more directly to withdrawal of a

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guilty plea than to imposition of sentence, but the sentencing court should be alert to indications that this problem may exist.

C. Considering Unconstitutionally Obtained Evidence

In State v. Rush, 147 Wis.2d 225, 432 N.W.2d 688 (Ct. App. 1988), the court of appeals held that evidence suppressed because it was seized in violation of the 4th Amendment may be considered at sentencing. "We see no basis for a claim that consideration of the suppressed evidence at sentencing will inspire or encourage illegal searches. . . . Applying the exclusionary rule to sentencing would also unduly restrict a trial court's access to a broad range of evidence in determining a proper sentence." 147 Wis.2d 225, 230.

A leading federal case, however, indicates that there may be situations where the Fourth Amendment exclusionary rule might be applied to sentencing. In Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), the court excluded illegally seized evidence at sentencing because the illegal search was conducted after the regular criminal investigation was finished for the purpose of finding contraband and enhancing the possibility of a heavier sentence. LaFave, Search and Seizure, § 1.6(f), p. 137 (West 1987).

It is not clear whether the Rush rule would be applied to statements obtained in violation of the 5th or 6th Amendment. There may be two aspects to this problem. The first question is whether the 5th or 6th Amendment limits on interrogation apply to presentence interviews conducted to obtain sentencing information.

In Estelle v. Smith, 451 U.S. 454 (1981), the United States Supreme Court held that Miranda and the 6th Amendment required that a defendant be given warnings and enjoy the assistance of counsel at a psychiatric interview later used against the defendant at the penalty phase of a death penalty trial. In State v. Knapp, 111 Wis.2d 380, 330 N.W.2d 242 (Ct. App. 1983), the defendant argued that Estelle requires the presence of counsel under the 6th Amendment and Miranda warnings at an interview preceding the preparation of the presentence report.

On the Miranda issue, the court of appeals distinguished Estelle and concluded that warnings are not necessary.

> Unlike the situation in Estelle, the purpose of a presentence investigation is not to generate evidence to be used by the state in proving an essential element of its case against the accused. Rather, presentence reports are designed to gather information concerning a defendant's personality, social circumstances and general pattern of behavior, so that the judge can make an informed sentencing decision. The interview does not involve the accusatorial atmosphere characterized by the stationhouse confrontation in Miranda or the

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> psychiatric examination on "future dangerousness" at issue in Estelle. Therefore, the Miranda safeguards should not be required.

111 Wis.2d 380, 386.

Knapp's argument based on the 6th Amendment right to counsel was also rejected, the court holding that Estelle did not require the presence of counsel, just the opportunity to get advice before the interview occurred.

Therefore, under Knapp, there can be no 5th or 6th Amendment violation at a presentence interview. There would be no grounds for arguing that an exclusionary rule based on the 5th or 6th Amendment could apply at the sentencing stage with respect to statements made during the presentence interview.

A second question is whether statements obtained outside a presentence interview, such as during a regular pretrial interrogation session, are admissible at sentencing if obtained in violation of 5th or 6th Amendment rights. Neither the United States Supreme Court nor the Wisconsin appellate courts have decided this question. Estelle v. Smith held that using such statements at sentencing was unconstitutional because they did incriminate the defendant in the sense of determining his punishment. Of course, Estelle v. Smith was a capital case, an important distinction that has been the basis for rules limited to the death penalty context.

VIII. Denying and Setting Parole Eligibility

There are three situations where a sentencing court is required or allowed to deny parole eligibility or to set a later parole eligibility date than called for by the generally applicable statute. This authority relates only to the "eligibility" date, that is, the date when the defendant may first be considered for parole release. The date of actual release on parole will continue to be determined by the Parole Commission.

A. Denying Parole for a "Persistent Repeater" — § 939.62(2m)

"Persistent repeater" is the term used to refer to those who are subject to imprisonment without the possibility of parole. The term originally applied only to those covered by the Wisconsin "three strikes" provision; 1997 Wisconsin Act 326 added certain offenders who have two convictions for certain child sex offenses.[25]

Subsection (2m)(a)2m. of § 939.62, originally enacted as part of the original "three strikes" provision, identifies the crimes that are considered to be "serious felonies." Subsection (2m)(b)1. provides that a person is a "persistent repeater" if he or she "has been convicted of a serious felony on 2 or more separate occasions at any time preceding the serious felony for which he or she presently is being sentenced. . . ."

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Subsection (2m)(a)1m. of § 939.62, created by Act 326, identifies the crimes that are considered to be "serious child sex offenses." Subsection (2m)(b)2. provides that a person is a "persistent repeater" if he or she "has been convicted of a serious child sex offense on at least one occasion at any time preceding the date of violation of the serious child sex offense for which he or she presently is being sentenced. . . ."

If the person qualifies as a "persistent repeater" under either of these standards, the sentence for the serious felony or serious child sex offense for which he or she is presently being sentenced "is life imprisonment without the possibility of parole." § 939.62(2m)(c).

The constitutionality of the statute's original "three strikes" provisions was upheld in State v. Lindsey, 203 Wis.2d 423, 554 N.W.2d 215 (Ct. App. 1996).

The "persistent repeater" allegation must be included in the charging document and proven in the same manner as a regular repeater allegation. See, § 973.12(1). If it is properly alleged and proven, the sentence of life without parole is mandatory; there is no exercise of discretion on the part of the sentencing court.

Even though the life without parole sentence is mandatory, the defendant must still be accorded the statutory right to allocution. State v. Lindsey, 203 Wis.2d 423, 446.

B. Setting Parole Eligibility in Class A Felonies — § 973.014

The authority for setting the parole eligibility date for persons convicted of Class A felonies was created by 1987 Wisconsin Act 412, with an effective date of July 1, 1988. The primary provision is § 973.014,[26] which, as amended by 1995 Wisconsin Act 48 provides as follows:

> 973.014 Sentence of life imprisonment; parole eligibility determination; extended supervision eligibility determination. (1) Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, but before December 31, 1999, the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (a) The person is eligible for parole under § 304.06(1).
>
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in § 304.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under § 304.06(1).
>
> (c) The person is not eligible for parole. This paragraph applies only if the court sentences a person for a crime committed on or after August 31, 1995, but before December 31, 1999.
>
> . . .

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(2) When a court sentences a person to life imprisonment under s. 939.62(2m)(c), the court shall provide that the sentence is without the possibility of parole or extended supervision.[27]

Subsection (1)(c) was created in 1995 to make it clear that a court could flatly deny parole eligibility. The original version of § 973.014 lacked a grant of that specific authority; the Wisconsin Court of Appeals held that the sentencing court was required to set a date certain and could not deny eligibility outright. State v. Setagord, 187 Wis.2d 340, 523 N.W.2d 124 (Ct. App. 1994). On remand in the Setagord case, the sentencing court then set a parole eligibility date that exceeded the defendant's life expectancy. A second appeal followed. The Wisconsin Supreme Court held that "§ 973.014(1)(b) unambiguously grants the circuit court discretion to impose a parole eligibility date beyond a defendant's expected lifetime." State v. Setagord, 211 Wis.2d 397, 565 N.W.2d 506 (1997). With the creation of sub. (1)(c) courts can now provide that a sentence is to be without the possibility of parole and need not resort to the strategy of setting a date that the defendant could not be expected to reach.

Subsection (2) refers to the sentencing of "persistent repeaters" under § 939.62(2m), which requires a mandatory sentence of life imprisonment without the possibility of parole. ["Persistent repeater" is the formal title for Wisconsin's "three strikes" law.]

Section 973.014 is silent regarding criteria for making the parole eligibility decision. The Wisconsin Supreme Court has held that the "factors that a sentencing court considers when imposing a sentence are the same factors that influence the determination of parole eligibility." State v. Borrell, 167 Wis.2d 749, 774, 482 N.W.2d 883 (1992), cited with approval in State v. Setagord, 211 Wis.2d 397, 416, 565 N.W.2d 506 (1997). Thus, it appears to the Committee that a court should refer to the regular criteria applicable to sentencing and try to relate them to the period of time that ought to elapse before the defendant sees the parole board rather than to the usual questions of prison or probation and, if prison, how long a term.

Note that the statute requires a specific finding in every Class A felony case. Unless the court orders that the defendant shall not be eligible for parole under sub. (1)(c), a determination must be made that parole eligibility will be as provided in § 304.06(1) or that eligibility will be at a later date than would be provided by following § 304.06(1). Section 304.06(1) establishes regular parole eligibility for a Class A felony at about 13 years, 4 months — 20 years, less the 1/3 reduction under § 302.11(1) (for what used to be called "good time").

Credit for presentence confinement under § 973.155 is not required to be awarded against a parole eligibility set by the court under § 973.014. State v. Chapman, 175 Wis.2d 231, 499 N.W.2d 223 (Ct. App. 1993). State v. Seeley, 212 Wis.2d 75, 567 N.W.2d 897 (Ct. App. 1997).

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C. Setting Parole Eligibility in "Serious Felonies" — § 973.0135

A provision similar to § 973.014 is found in § 973.0135, Sentence for certain serious felonies; parole eligibility determination. This provision requires the court to set a parole eligibility date for certain offenders in other than Class A felonies. The statute applies to a person who is being sentenced for a "serious felony" and who has previously been convicted of a "serious felony" and sentenced to more than one year of imprisonment. Crimes that qualify as a "serious felony" are specified in sub. (1)(b). They are the same as those specified as "serious felonies" under § 939.62(2m)(a)2m. for purposes of the "persistent repeater" or "three strikes" law.

Section 973.0135 applies to sentences imposed for crimes committed on or after April 21, 1994, and requires the court to make a parole eligibility determination by choosing one of two options set forth in sub. (2):

> (a) The person is eligible for parole under s. 304.06(1).
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06(1) and may not set a date that occurs later than two-thirds of the sentence imposed for the felony.

This section does not apply if the current "serious felony" is a crime punishable by life imprisonment; in that situation, § 973.014 will apply. The effect of § 973.0135(2)(b) is to allow a court to set a parole eligibility date that falls at a point after the regular eligibility date [25% of the sentence imposed] and not later than the date for mandatory release [two-thirds of the sentence imposed]. Regardless of the action taken by the sentencing court as to parole eligibility, persons convicted of a "serious felony" are now subject to only a "presumptive" mandatory release date. The parole commission decides whether to deny presumptive mandatory release. See § 302.11(1g)(b).[28]

IX. Stay of Execution of Sentence

Section 973.15(8) specifies the situations where execution of a sentence may be stayed:

> (8) (a) The sentencing court may stay execution of a sentence of imprisonment or to the intensive sanctions program only:
>
> 1. For legal cause;
> 2. Under § 973.09(1)(a); or
> 3. For not more than 60 days.
>
> (b) If a court sentences a person under s. 973.03(5)(b), this subsection applies only to the first period of imprisonment.

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"Legal cause" under sub. (a)1. has been interpreted to mean for the purpose of allowing the defendant to pursue within the Wisconsin court system some relief against the sentence or conviction. Reinex v. State, 51 Wis. 152 (1881); Weston v. State, 28 Wis.2d 136, 135 N.W.2d 820 (1965). A stay to allow the defendant's release while a federal habeas corpus petition is pursued is not authorized in Wisconsin. State v. Shumate, 107 Wis.2d 460, 319 N.W.2d 834 (1981).

The "for legal cause" basis for staying execution of sentence was applied in State v. Szulczewski, 216 Wis.2d 494, 574 N.W.2d 660 (1998), in a case where a person already subject to a commitment as not guilty by reason of mental disease or defect was convicted of a crime and faced criminal sentencing. The trial court sentenced the person to five years in prison and ordered that the sentence begin immediately, concluding that immediate commencement of the criminal sentence was required by § 973.15. The supreme court held that the commitment could provide "legal cause" for stay of execution of sentence under § 973.15(8)(a)1. The sentencing court may exercise discretion in determining whether to stay execution of the new prison sentence, balancing the purposes of the commitment with the traditional purposes of criminal sentencing: deterrence, rehabilitation, retribution, and segregation.

Subsection (a)3. was created in response to State v. Braun, 100 Wis.2d 77, 301 N.W.2d 180 (1981), which held that in the absence of special statutory authorization, Wisconsin courts lacked authority to grant a delay to allow a defendant to put his affairs in order. Subsection (a)3. apparently authorizes that type of stay, although it would be limited to 60 days. The Attorney General has advised that it is not permissible to stay a jail sentence beyond the 60 day limit recognized in sub. (a)3. because of jail overcrowding. OAG 39-87, July 13, 1987.

X. Resentencing After a Successful Appeal

In State v. Carter, 208 Wis.2d 142, 560 N.W.2d 256 (1997), the Wisconsin Supreme Court clarified the standard that applies when it is necessary to resentence a defendant who has successfully appealed the initial conviction or sentence. A sentencing court in that situation is to "consider all information relevant about a defendant, including information about events and circumstances either that the sentencing court was unaware of at the initial sentencing or that occurred after the initial sentencing." 208 Wis.2d 141, 146. The decision resolved a conflict between two decisions of the court of appeals: State v. Pierce, 117 Wis.2d 83, 342 N.W.2d 776 (Ct. App. 1983), held that an increased sentence could be supported by reference to the fact that the defendant had been arrested for two batteries committed after the initial sentencing; State v. Solles, 169 Wis.2d 556, 485 N.W.2d 457 (Ct. App. 1992), held that a resentencing court could not consider information favorable to the defendant that occurred after the initial sentence was imposed. Carter overruled Solles.

The Carter decision also rejected the distinction proposed by the state that would have treated differently cases where the entire conviction was reversed and cases where just the sentence was vacated. Carter held that both cases are to be treated the same: when resentencing is required for any reason, the initial sentencing is a nullity and ceases to exist. The court's role is the same at

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resentencing as at the initial sentencing and the court should have complete, accurate and current information. 208 Wis.2d 141, 154.

Carter leaves intact the basic principle applicable to resentencing after successful appeal: the defendant is not to receive a harsher sentence as punishment for the successful exercise of the right to appeal. Due process principles protect against vindictiveness by requiring that a harsher sentence must be "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 208 Wis.2d 141, 148, quoting North Carolina v. Pearce, 395 U.S. 711, 726 (1969). Also see State v. Stubbendick, 110 Wis.2d 693, 329 N.W.2d 399 (1983).

COMMENT

SM-34 was originally published in 1976 and revised in 1990 and 1991. This revision was approved by the Committee in February 1999 and involved a general updating and the addition of new material at sections II.D., V., VIII., IX., and X.

1. The American Bar Association Standards for Criminal Justice were reenacted in a second edition in 1980. This provision was reenacted as Standard 20-2.3(c), with the exception of the last sentence which was deleted.

2. The equivalent provision in the second edition of the ABA Standards (see note 1, supra) is Standard 18-2.2(a), Sentencing Alternatives and Procedures:

> (a) The sentence imposed in each case should call for the minimum sanction which is consistent with the protection of the public and the gravity of the crime. In determining the gravity of the offense and the public's need for protection, sentencing authorities best serve the public interest and the appearance of justice when they give serious consideration to the goal of sentencing equality and the need to avoid unwarranted disparities.

The revised standard deletes reference to "the rehabilitative needs of the defendant" as a criteria for deciding when confinement is called for. See note 3, below.

3. This standard was revised in the 1980 edition of the ABA Standards and is found in part in Standard 18-2.5(c):

> (c) A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the defendant selection of total confinement in a given case are:
>
> > (i) Confinement is necessary in order to protect the public from further serious criminal activity by the defendant; or
> > (ii) Confinement is necessary so as not to unduly depreciate the seriousness of the offense and thereby foster disrespect for the law.

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On the other hand, neither community hostility to the defendant nor the apparent need of the defendant for rehabilitation or treatment provides acceptable reasons for imposing a sentence of total confinement.

Former Standard 1.3(b) appears at Standard 18-2.3(vi) of the second edition, without change.

4. Sections 973.013(4) and 972.15(2m); State v. Jones, 151 Wis.2d 488, 444 N.W.2d 760 (Ct. App. 1989). See Sec. V., this Special Material.

5. Sections 48.35(1)(b) and 938.35(1)(a); Lange v. State, 54 Wis.2d 569, 196 N.W.2d 680 (1972); State v. Johnson, 105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1982).

6. Austin v. State, 49 Wis.2d 727, 183 N.W.2d 56 (1971).

7. United States v. Grayson, 438 U.S. 41 (1978). Grayson reaffirmed that it is not permissible to impose an added term for suspected perjury. However, the defendant's false testimony is considered relevant to the defendant's prospects for rehabilitation and therefore may be relied on by the sentencing judge to determine the appropriate sentence. The Wisconsin rule appears to be the same. See Lange v. State, cited above, note 5, and Zastrow v. State, 62 Wis.2d 381, 215 N.W.2d 426 (1974).

8. State v. Olson, 127 Wis.2d 412, 380 N.W.2d 375 (Ct. App. 1985). Also see Roberts v. United States, 445 U.S. 552 (1980), where the court held that a defendant's refusal to name his suppliers in a drug conspiracy was properly considered at sentencing. In Roberts, the defendant made no claim before the sentencing judge that his refusal was based on concerns of self-incrimination or fears of physical retaliation. Had it been, the argument would have "merited serious consideration. . . . But the mere possibility of unarticulated explanations or excuses for antisocial conduct does not make that conduct irrelevant to the sentencing decision." 445 U.S. 552, 559.

9. In State v. Bobbitt, 178 Wis.2d 11, 503 N.W.2d 11 (Ct. App. 1993), the defendant was tried on charges of attempted first degree intentional homicide while armed, robbery, and false imprisonment. The jury acquitted him of the attempted homicide charge and convicted him on the others. In sentencing, the court referred to the violence that accompanied the robbery; the violence had been the basis for the attempted homicide charge. The court of appeals concluded that "the trial court did not misuse its discretion when it considered the violent conduct surrounding the attempted homicide for which Bobbitt was acquitted." 178 Wis.2d 11, 18.

The Bobbitt result is consistent with statements in prior Wisconsin cases, but there was no express authority on the issue. [See, for example, State v. Marhal, 172 Wis.2d 491, 501-04, 493 N.W.2d 758 (Ct. App. 1992), concluding that there would have no error even if the trial court in that case had considered the defendant culpable of a more serious crime where the jury returned a verdict on a lesser included offense.] The United States Supreme Court has reached the same conclusion in a case challenging provisions of the Federal Sentencing Guidelines which allow consideration of acquittal conduct. United States v. Watts, 518 U.S. 148 (1997).

10. Hanneman v. State, 50 Wis.2d 689, 184 N.W.2d 896 (1971); Kubart v. State, 70 Wis.2d 94, 233 N.W.2d 404 (1975); Jung v. State, 32 Wis.2d 541, 145 N.W.2d 684 (1966); and United States v. Wiley, 267 F.2d 453 (7th Cir. 1959), 278 F.2d 500 (7th Cir. 1960).

11. Scales v. State, 64 Wis.2d 485, 219 N.W.2d 286 (1974); Williams v. State, 79 Wis.2d 235, 255 N.W.2d 504 (1977).

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12. See Kubart v. State, and United States v. Wiley, cited in note 10, supra. It is proper, however, to consider a wholly frivolous defense and the defendant's conduct at trial. Finger v. State, 40 Wis.2d 103, 161 N.W.2d 272 (1968); Lange v. State, cited in note 5, supra.

13. Several Wisconsin cases have discussed claims by defendants that the sentencing court improperly considered religious or political beliefs or associations. The general rule appears to be that beliefs and associations protected by the First Amendment may not be considered at sentencing unless a reliable connection is established between the criminal conduct and the defendant's beliefs and associations.

The United States Supreme Court addressed the issue in connection with capital sentencing in Dawson v. Delaware, 503 U.S. 159 (1992). Evidence was introduced relating to the defendant's membership in the Aryan Brotherhood, a white supremacist prison gang. The court did not hold that consideration of that evidence was banned in all cases, but found that the state had failed to show how it was connected to any matter relevant to sentencing.

The Wisconsin Court of Appeals has addressed this issue several times. In State v. Fuerst, 181 Wis.2d 903, 512 N.W.2d 243 (Ct. App. 1994), the court found that the sentencing court's remarks about the defendant's lack of religious beliefs and failure to attend church constituted an erroneous exercise of discretion. It is not improper "to include information about religious beliefs and practices in presentence reports as part of the description of the defendant's 'whole person,'" 181 Wis.2d 903, 913, but that information cannot be relied on in sentencing unless a relationship is established between those beliefs and the criminal conduct.

In State v. Marsh, 177 Wis.2d 643, 502 N.W.2d 899 (Ct. App. 1993), the defendant claimed his sentencing was tainted by the inclusion of evidence that he studied Odinism, the white supremacy religion of the Vikings, and possessed other material relating to the Ku Klux Klan, Nazi Germany, and the National Association for the Advancement of White People. The state conceded that some of this information was improperly considered because it was unrelated to the crime, but the court of appeals found it was harmless error.

In State v. J.E.B., 161 Wis.2d 655, 469 N.W.2d 192 (Ct. App. 1991), the court of appeals upheld the sentencing court's consideration of information showing that the defendant read books including graphic descriptions of adults having sexual contact with children. Although the books are presumably protected by the First Amendment, a sufficient relationship was shown between them and the defendant's criminal activity — sexual assault of a child.

Both Fuerst and J.E.B. apply a test articulated in United States v. Lemon, 723 F.2d 922, 936 (D.C. Cir. 1983): "due process at sentencing requires that before a court may consider a defendant's associations, there must be some identifiable link between those associations and the crime for which the defendant was convicted."

14. See note 16, below.

15. The intent of this statement is to emphasize that the sentence should not be structured as to negate the effect of § 973.155 which requires credit against the sentence for time spent in presentence confinement. The Wisconsin Supreme Court has identified the procedure that should be followed:

> . . . trial judges are first to determine and impose an appropriate sentence independently of any time previously served. Only then should time served be determined and become relevant to the final sentence imposed on the conviction. The time previously served should not be a factor in the exercise of sentencing discretion. . . .

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State v. Walker, 117 Wis.2d 579, 586, 345 N.W.2d 413 (1984). Also see Struzik v. State, 90 Wis.2d 357, 279 N.W.2d 922 (1979), and Klimas v. State, 75 Wis.2d 244, 249 N.W.2d 285 (1977), requiring the same procedure.

Recent decisions of the Wisconsin Court of Appeals have continued to list "pretrial confinement" as one of the many permissible sentencing factors. See, for example, State v. Jones, 151 Wis.2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989), and State v. Larsen, 141 Wis.2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). However, these cases have not explicitly focused on the issue that is of concern here. They appear simply to have repeated the long list of permissible sentencing factors that can ultimately be traced to cases that preceded the clarification of the right to credit for presentence confinement and the jail credit statute. Thus, the procedure set forth in Walker ought to be followed. (Awarding credit for presentence confinement is discussed in SM-34A, Determining Sentence Credit Under § 973.155.)

16. Also see State v. Fuerst, 181 Wis.2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994), citing State v. Wickstrom, 118 Wis.2d 339, 348 N.W.2d 183 (Ct. App. 1984) for the proposition that "a sentencing court does not erroneously exercise its discretion by noting a defendant's lack of remorse as long as the court does not attempt to compel an admission of guilt or punish the defendant for maintaining his innocence."

17. In State v. Panknin, 217 Wis.2d 200, 204, 579 N.W.2d 52 (Ct. App. 1998), the court concluded that "irreversible harm would be done to the judicial process by opening the private notes of the court to litigants." The court also suggested a method for handling notes:

> A judge's personal notes should not be placed in the clerk of court's file. It is too easy for a clerk to become distracted and forget to seal the notes; or, there is nothing preventing a person reviewing the file from opening sealed notes. A better practice is to keep a personal filing cabinet for notes in chambers. A court can use file folders labeled with the case number or keep notes on the computer's hard drive using the case number for the file name. The confidential nature of the notes is secure if the court keeps them in chambers and out of the public court file.

217 Wis.2d 200, 204, at footnote 2.

18. 1989 Wisconsin Act 142 (effective date: March 31, 1990), created § 973.033 to read:

> Sentencing; restriction on firearm possession. Whenever a court imposes a sentence or places a defendant on probation regarding a felony conviction, the court shall inform the defendant of the requirements and penalties under s. 941.29.

Section 941.29 makes it a Class E felony for a convicted felon to possess a firearm.

19. Section 973.034 provides:

> Whenever a court imposes a sentence or places a defendant on probation regarding a conviction under s. 940.22(2) or 940.225(2)(c), if the victim is under 18 years of age at the time of the offense, or a conviction under s. 948.02(2), 948.025(1), 948.05(1), 948.06 or 948.07(1), (2), (3) or (4), the court shall inform the defendant of the requirements and penalties under s. 948.13.

Section 948.13 makes it a Class C felony for a person previously convicted of a "serious child sex offense" to "engage in an occupation or participate in a volunteer position that requires him or her to work or interact primarily and directly with children under 16 years of age."

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The requirement that courts inform defendants at sentencing and the new criminal offense under § 948.13 both apply to offenses committed on or after May 6, 1997, the effective date of 1995 Wisconsin Act 265 which created both statutes.

20. Section 973.048(1) provides that when a court sentences or places on probation a person convicted of a designated sex offense, "the court shall require the person to comply with the reporting requirements under s. 301.45. Subsection (2) of § 973.048 provides that when a person is sentenced or placed on probation for any violation of "ch. 940, 944 or 948 or ss. 943.01 to 943.15, the court may require the person to comply with the reporting requirements under s. 301.45 if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01(5), and that it would be in the interest of public protection to have the person report under s. 301.45."

The reference to "s. 301.45" is to the statute requiring that sex offenders register with the department of corrections. The effective date of § 973.048 is June 1, 1997.

21. Section 973.18(2) requires that the trial judge personally inform the defendant at the time of sentencing of the right to seek postconviction relief and, if indigent, the right to the assistance of the state public defender. See SM-33, Information on Postconviction Relief.

22. See note 18, supra.

23. See notes 19 and 20, supra.

24. See note 21, supra.

25. The effective date of 1997 Wisconsin Act 326 was July 16, 1998. Section 15 of the Act provides that "the treatment of section 939.62(2m)(b)2. of the statutes first applies to serious child sex offenses committed on the effective date of this subsection, but does not preclude the counting of other serious child sex offenses as prior serious child sex offenses for sentencing a person as a persistent repeater under section 939.62(2m)(b)2. of the statutes, as created by this act."

26. The constitutionality of § 973.014 as originally enacted was upheld in State v. Borrell, 167 Wis.2d 749 482 N.W.2d 883 (1992).

27. The references restricting applicability to offenses committed " before December 31, 1999" recognize that the "truth in sentencing" system created by 1997 Wisconsin Act 283 is scheduled to take effect on that date. "Extended supervision" is a component of that system.

28. The provision for "presumptive" mandatory release was created at the same as § 973.0135. See 1993 Wisconsin Act 194. Both provisions apply to sentences for offenses committed on or after April 21, 1994.

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SM-34A DETERMINING SENTENCE CREDIT UNDER SECTION 973.155

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I. Introduction

Wisconsin Stat. § 973.155(1) establishes the basic rule governing sentence credit: An offender is entitled to sentence credit for time he or she spent in custody in connection with the course of conduct for which sentence is imposed. In addition, § 973.155(2) requires a sentencing court to make a specific finding of the number of days for which sentence credit is to be granted to an offender under § 973.155 and to include that finding in the judgment of conviction. The purpose of this Special Material is to assist the court in making a proper determination of sentence credit.

A sentencing court must give credit accorded by the statute because an offender may not serve more time than that for which he is sentenced.[1] Sentence credit has the effect of reducing the amount of time the offender serves in jail or, for bifurcated sentences, in prison under the term of confinement before reaching the date on which he or she is released to the term of extended supervision. That is because, with one exception,[2] when credit is granted an offender's sentence is computed as having begun as many days before the date of sentencing as days credit have been granted. For example, an offender sentenced to 10 years of imprisonment, consisting of five years of confinement and five years of extended supervision, and entitled to six months of credit will be released to extended supervision four years, six months from the date of sentencing.

The basic rule for determining credit is easily stated, but its application can be difficult, particularly in situations in which an offender has multiple cases with different periods of pretrial custody and concurrent or consecutive sentences. To help the sentencing court understand and apply the basic rule, this Special Material proceeds as follows. First, it explains the basic rule governing sentence credit. Next, it discusses procedural and technical aspects of making a credit determination. It then provides a detailed explanation of the basic rule used to determine the number of days for which credit is due. After that explanation, it discusses situations that arise with some regularity, and illustrates, with reference to case law, if available, how to determine credit in those situations. Finally, it provides information about correcting a finding of sentence credit.

II. The Basic Rule

The basic rule for determining sentence credit is set forth in § 973.155(1) and (1m), which read as follows:

> **(1)**(a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an

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offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:

1. While the offender is awaiting trial;
2. While the offender is being tried; and
3. While the offender is awaiting imposition of sentence after trial.

(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113 (8m), 302.114 (8m), 304.06 (3), or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

(1m) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 165.95 (3), as determined by the department of justice under s. 165.95 (9) and (10), for any offense arising out of the course of conduct that led to the person's placement in that program.

The basic rule, then, is that entitlement to sentence credit depends on the offender having been in custody in connection with the course of conduct for which sentence is imposed.[3] A defendant seeking sentence credit has the burden of demonstrating both custody and its connection with the course of conduct for which the sentence was imposed.[4] Entitlement does not depend on the offender's inability to post bond.

The focus of this Special Material is the determination of sentence credit for days spent in custody up to the date of sentencing, as identified in the three periods of time listed in § 973.155(1)(a).[5] It will also address credit when imposing sentence in sentence withheld – probation ordered cases, which may include time the offender spent in custody while on probation.

III. Procedure for Making the Finding of Sentence Credit in All Cases

A. Tell the parties to be prepared to address sentence credit at sentencing

A great saving of judicial time and energy can be realized if an accurate determination of sentence credit is made at the time the judgment of conviction is entered, when the facts are fresh, records are available, and the defendant and counsel are present to address the issue. Therefore, the court should require the parties to be prepared to address the sentence credit issue at the time of sentencing. Disputes about the number of days for which credit is due should be anticipated and settled before judgment is entered, by

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stipulation or, if necessary, further hearing. Accurate information and the informed participation of prosecutor and defense counsel are essential.

B. Make a finding after the proper disposition has been determined

In all cases, the court should first follow its usual procedure to determine the appropriate disposition. After the decision as to type and length of disposition has been made, the finding of the number of days for which sentence credit is due should be made.[6]

C. Make a finding in every case

The finding regarding sentence credit should be made in every case, including those where the disposition is probation or the sentence is to home detention under § 973.03(4).[7] Although § 973.155 does not explicitly require that the sentence credit determination be made in cases where sentence is withheld and probation ordered, making the finding in probation cases will document the finding of credit due up to the date of disposition and make it available if probation is later revoked. (NOTE: The finding on the original judgment will relate only to the credit due as of the date of that judgment; additional credit may also be appropriate at the time of revocation for custody during the revocation process. The consideration of other periods of time in the sentence withheld – probation ordered and revoked case is discussed below, in Section V.B.)

In a case in which the disposition is probation and the court orders jail time as a condition under § 973.09(4), any sentence credit the court grants does not have to be credited against the condition time, although the court has discretion to do so.[8]

D. Make the finding in terms of a number of days

The defendant is entitled to a day of sentence credit for each calendar day during which they spent at least part of the day in custody. State v. Johnson, 2018 WI App 2, 379 Wis.2d 684, 906 N.W.2d 704, ¶8. Only the number of days for which credit is due should be determined by the court. That number should be entered on the judgment of conviction. The standard judgment of conviction form adopted by the Judicial Conference and mandated for use under § 971.025(1) includes a blank for entering a finding of the number of days of credit.

The finding should be in terms of the number of days and should not be expressed as weeks, months, years, or fractions thereof. The sentencing court should not determine the date sentence is to commence. The prison registrar or jail custodian will compute the sentence. As noted in the Introduction, the sentence will be computed as though it had

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begun as many days before the date of sentencing as days credit have been granted. That is, the sentence of an offender sentenced by the court on May 1, and entitled to 30 days sentence credit, will be computed as though it began on April 1. The date on which the offender is eligible for release will be calculated by the prison registrar or jail custodian as though the sentence had begun April 1.

E. If no credit is due, make that finding

The court should make a specific finding even when it determines that no credit is due. Insert "No" or "0" in the blank provided for the sentence credit finding. This will avoid future questions about whether credit was considered.

F. Apply the credit to the sentence being served

When sentence credit is applied at the time of sentencing, the circuit court should apply sentence credit to the term of incarceration.[9] For instance, if an offender is entitled to credit applicable to charges for which he receives both an imposed sentence and a stayed sentence, the credit must be applied to the imposed sentence.[10]

IV. An Explanation of the Basic Rule

The basic rule established by § 973.155 is that an offender is entitled to sentence credit if the person was A) in custody and the custody was B) in connection with C) the course of conduct for which sentence is imposed. If one of these requirements is not met, the defendant is not entitled to credit.

A. In custody…

"In custody" is not defined in § 973.155, but the Wisconsin Supreme Court has held that "for purposes of sentence credit an offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status." State v. Magnuson, 2000 WI 19, ¶31, 233 Wis.2d 40, 606 N.W.2d 536.

This means the inquiry into whether an offender was in "custody" begins with the definition of "custody" provided in the escape statute, § 946.42(1)(a)1. In the majority of cases, application of that definition will be sufficient. In some cases, however, the court may also have to consider whether the offender was in a status that subjected him or her to an escape charge for leaving that status.

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1. "Custody" based on liability under the escape statute

a. "Custody" as defined in § 946.42(1)(a)1.

Section 946.42(1)(a)1. provides that "custody" includes without limitation the following:

a. Actual custody of an institution, including a juvenile correctional facility, as defined in s. 938.02 (10p), a secured residential care center for children and youth, as defined in s. 938.02 (15g), a juvenile detention facility, as defined in s. 938.02 (10r), a Type 2 residential care center for children and youth, as defined in s. 938.02 (19r), a facility used for the detention of persons detained under s. 980.04 (1), a facility specified in s. 980.065, or a juvenile portion of a county jail.[11]

b. Actual custody of a peace officer or institution guard.

bm. Actual custody or authorized physical control of a correctional officer.

c. Actual custody or authorized physical control of a probationer, parolee, or person on extended supervision by the department of corrections.

e. Constructive custody of persons placed on supervised release under ch. 980.

f. Constructive custody of prisoners and juveniles subject to an order under s. 48.366, 938.183, 938.34 (4d), (4h), or (4m), or 938.357 (4) or (5)(e) temporarily outside the institution whether for the purpose of work, school, medical care, a leave granted under s. 303.068, a temporary leave or furlough granted to a juvenile, or otherwise.

g. Custody of the sheriff of the county to which the prisoner was transferred after conviction.

h. Custody of a person subject to a confinement order under s. 973.09(4).

The following situations are within this definition of custody:

- Detention in the county jail before bail is set or thereafter;

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- Detention in the county jail during nonworking hours as a condition of bail release or probation;[12]

- Commitment for the determination of competency to stand trial under § 971.14(2) or commitment as not competent to stand trial under § 971.14(5);

- Detention in jail in another state when that detention results at least in part from a Wisconsin warrant;[13]

- Time spent in secure juvenile detention pending a waiver to adult court, when jurisdiction is waived and an adult sentence is imposed;[14]

- Time spent at an in-house rehabilitation center when "temporarily outside the [jail] for the purpose of medical care";[15]

- Time elapsing after a person reports to jail but is turned away due to overcrowding.[16]

b. "Custody" based on unauthorized departure from certain correctional settings

Under Magnuson a person who is in a correctional program that does not constitute "custody" under the definition in § 946.42(1)(a) is still entitled to credit if the statute that creates the correctional program allows for an escape charge for unauthorized departure from the program. Magnuson, 233 Wis.2d 40, ¶¶26-30. In most cases this basis for "custody" will not come into play, as the correctional programs covered by the definition are for offenders who have already been sentenced. Nonetheless, such claims may arise in cases where an offender was in custody on more than one case or charge, so the court and counsel should be aware of the programs that are covered. They include:

- The community residential confinement program under § 301.046;

- The intensive sanctions program under § 301.048;

- Jail labor off the institution grounds under § 302.37(4);

- Home detention under § 302.425;

- Prison labor off the institution grounds under § 303.03;

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- Work release plans for prison inmates under § 303.065; and

- County work camps under § 303.10;

- Placement of a juvenile offender in a setting specified under §§ 938.357(4)(a), 938.533(3)(a), 938.538(4)(a), and 938.539(1).

2. Participation in certain AODA programs covered by § 973.155(1m)

Under § 973.155(1m), a person is entitled to credit "for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 165.95(3), as determined by the Office of Justice Assistance under s. 165.95(9) and (10) for any offense arising out of the course of conduct that led to the person's placement in that program." The substance abuse treatment programs referred to are those mandated for participants in a qualified "treatment" court.

The Committee concluded that the standard for determining whether the person's status constituted "custody" for purposes of sub. (1m) is the same standard that applies under sub. (1): If the offender was subject to an escape charge for leaving the status, sentence credit should be granted for time spent in that status. Further, § 973.155(1m) is clear that credit for the time the offender was in the treatment program may be applied only to the sentence for the offense being handled in the treatment court.

3. Situations not considered to constitute "custody"

Not included within the definitions of "custody" for sentence credit purposes are the following situations:

- Conditions of release on bond that do not involve spending parts of each day in the county jail;[17]

- Voluntary participation in drug, alcohol, or other treatment programs even though the offender may not be completely free of all restraint on his liberty during such program,[18] unless the program is covered under § 973.155(1m);

- Home detention under a federal consent decree designed to reduce jail overcrowding;[19]

- Time spent on electronic monitoring as a condition of probation.[20]

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B. …in connection with…

1. Determining whether a connection exists

The requirement that custody be "in connection with" the course of conduct means simply that the custody must be, at least in part, the result of a legal status (arrest, bail, Department of Corrections hold, court order, etc.) stemming from the course of conduct for which sentence is being imposed. If the offender was under restraint for reasons related to the course of conduct, credit is required.[21]

The connection between the custody and the conduct for which sentence is imposed must be a factual connection, not just a "procedural" or "tangential" one.[22] For example, the fact that an offender is sentenced in multiple cases at the same time does not create a connection between custody and the sentences imposed.[23]

Where there are multiple charges an offender's custody may be "in connection with" one charge but not another. Thus, the filing of a detainer against someone already in custody on other charges does not result in "custody" on the charges covered by the detainer.[24] Similarly, an offender is in general not entitled to sentence credit under § 973.155 for custody that is being served in satisfaction of another unrelated criminal sentence.[25]

For example, if an offender serving a sentence for theft is charged with battery to another inmate, his custody is connected only to the theft sentence, not to the battery charge, as long as he is serving that theft sentence.[26]

As another example, assume a person is released on personal recognizance on one charge but later is arrested on a different charge and remains in custody as a result of an inability to post cash bail. When sentenced, the person is entitled to credit only on the sentence for the charge on which he was held in custody. This is true even if the charge on which he was in custody was bail jumping based on a violation of the conditions of the personal recognizance bond in the other case.[27]

2. A connection between custody and a charge may be "severed"

When an offender has multiple charges, a period of custody may initially be connected to all of the charges, but an event relating to one of the charges may "sever" that connection. Once the connection between custody and a particular charge is severed, the offender no longer earns credit toward that charge.

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The most common way for a connection between custody and multiple charges to be severed is by sentencing on one of the charges. For instance, assume a person is arrested and held in custody in two separate cases, A and B. If he is sentenced in Case A before he is sentenced in Case B, the sentencing in Case A severs the connection between the custody and Case B, and he is in custody solely for the conviction in Case A. Thus, the person is not entitled to credit toward Case B for any time in custody after being sentenced in Case A.[28]

C. ...the course of conduct for which sentence is being imposed

The use of "course of conduct" rather than a more limited term, such as "offense" or "crime," suggests that credit is to extend to periods of custody that may not have been caused by the specific crime for which sentence is ultimately imposed. Credit is required in at least four situations which raise the "course of conduct" issue:

1. Where several crimes were charged as a result of a single course of conduct, but the offender is convicted of only one crime. Thus, an offender held in custody as a result of charges of theft, burglary, and battery, all resulting from a single incident, must receive sentence credit even if he is convicted of only one of the crimes charged;

2. Where offenses for which the person spent time in custody are "read in" for purposes of sentencing in another case, the offender is entitled to credit for the custody on the read-in offenses, regardless of whether the read-in offenses are factually connected to the course of conduct for which sentence was imposed;[29]

3. Where the offender is convicted of a crime which is a lesser included offense of the crime originally charged. Thus, an offender is entitled to credit if he was arrested for and charged with armed robbery even if he is convicted of the lesser included crime of theft; and

4. Where the offender is held in custody on a probation, parole, or extended supervision hold which is issued due to the course of conduct for which sentence is imposed. (See § 973.155(1)(b).) Credit will be due toward both the sentence for the course of conduct and the sentence in the case in which the hold was issued up to the time the defendant begins serving one of the sentences, unless the sentences are consecutive.[30]

Note, however, that "course of conduct" does not mean "criminal episode." In State v. Tuescher, 226 Wis.2d 465, 595 N.W.2d 443 (Ct. App. 1999), the court held "a defendant earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts." Id., 479.[31]

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V. Applying the Basic Rule in Common Situations

A. The credit determination to make at the time of original disposition in all cases

The determination to be made at the time of original disposition in all cases is the period of time the offender spent in custody in connection with the course of conduct up to the date of sentencing. The statute identifies three periods of time specifically, namely, those occurring:

1) while the offender is awaiting trial;
2) while the offender is being tried; and
3) while the offender is awaiting imposition of sentence after trial.

B. Imposing sentence after probation has been revoked in a sentence withheld case

1. Determining sentence credit at the time of sentencing after revocation

The basic procedure outlined above should have been followed when the original disposition was ordered in the sentence withheld – probation ordered case. If probation is revoked and an offender is returned to court for imposition of sentence, another sentence credit determination must be made. Three separate periods of time are relevant to the new sentence credit determination:

- Days in custody prior to original disposition – this finding should be found in the judgment of conviction entered at the time of original disposition;

- Days in custody after original disposition and through the date of probation revocation (for, *e.g.*, conditional jail time, holds, or sanction time) – this finding should be found in the revocation order and warrant issued by the department or in the revocation summary provided by the department; and

- Days in custody after revocation, awaiting imposition of sentence – this finding must be made by the sentencing court.

2. "Custody" during the period of probation

Questions may arise about what constitutes "custody in connection with the course of conduct" in the sentence withheld case. These relate primarily to whether certain restrictive situations constitute "custody." It is clear that time spent in jail awaiting

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revocation should be credited. But restrictions on an offender during the probationary period raise questions:

a. Jail time as a condition of probation

Section 973.155 is not explicit about whether sentence credit is required for time spent in the county jail as a condition of probation. However, the definition of "custody" under the escape statute expressly covers time spent in jail as a condition of probation.[32] That means the offender was in custody while serving that condition time and is therefore entitled to credit for that time toward a sentence imposed after revocation of probation.

b. Time in a treatment facility as a condition of probation

If a probationer spent time in, for example, a drug treatment facility, he or she will be entitled to credit for that time if one of the following applies:

1. The person's status was such that he or she was in "custody" under the standard discussed above in Section IV.A 1, because the offender was subject to an escape charge for leaving the status.

2. Treatment program is covered under § 973.155(1m) as discussed in Section IV.A 2.

C. Sentence credit in multiple sentence situations

Proper determination of sentence credit can become complex in cases where several sentences are involved. The possible situations and relationships are endless.

Problems can be minimized if the court informs itself about the credit applicable to any previously imposed sentence and ensures that each judgment for the sentences it imposes has a finding of sentence credit. This can most easily be achieved by requiring the parties to come to court prepared to discuss and settle the sentence credit issue.

In light of the basic rule discussed above, in Section IV, the Committee recommends the following guiding principles in multiple sentence situations:

- When sentence A is to run concurrently with sentence B, the custody credited to sentence A must be factually connected to the course of conduct for which sentence A is imposed.

- When sentence A is to run consecutively to sentence B, the custody factually connected to sentence A is credited to the sentence only if the custody has *not*

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already been credited to sentence B. The aim is to credit the total sentence (consisting of all consecutive sentences put together) with one day for each day spent in custody without duplication of credit for time in custody in connection with more than one of the sentences.

1. Concurrent sentences

When concurrent sentences are imposed for offenses arising from the same course of conduct, sentence credit is to be determined as a total number of days and is to be credited against each sentence imposed. Credit against each sentence is required because credit against only one sentence would be negated by the concurrent sentence. Thus, if the credit was not awarded against both sentences, the offender would not receive the credit to which he is entitled.[33]

However, if concurrent sentences are imposed for offenses that do not arise out of the same course of conduct, the court must determine which sentence any specific period of time in custody should be credited against. As noted above in Section IV.B.2, as a general rule sentencing on one charge severs the connection between the custody and other pending charges. Thus, when custody is in connection with multiple, unrelated charges, credit should be granted on all concurrent sentences imposed for the charges up to the time the defendant begins serving one of the sentences. The amounts may not be equal. Also, the fact that concurrent sentences are imposed at the same time does not serve to transform custody connected to one case into custody connected to another case.[34]

Examples of concurrent sentence situations follow.

a. Multiple counts in a single judgment

Concurrent Sentence Example 1
Smith was arrested for two burglaries, charged in a two-count information, and convicted of both charges on the same day. He spent one year in jail awaiting disposition. He was sentenced to serve five years of imprisonment on each count, the sentences to run concurrently with one another.

The judgment of conviction should order that credit is due for 365 days pursuant to § 973.155.

When the judgment reaches the prison, the registrar will credit each of the concurrent sentences with 365 days, thus computing the sentences as though they had begun 365 days earlier.

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b. Sentences on unrelated charges for which different amounts of credit are due

Concurrent Sentence Example 2
Johnson is arrested and charged with a burglary and remains in custody for 10 days before posting bail. He is later arrested for a new burglary and remains in custody, unable to post bail. 150 days after his second arrest, he is convicted of both charges and given two years of imprisonment on each count, concurrent.

The judgment of conviction on the first burglary should order that credit is due for 10 days, while the judgment for the second conviction should order 150 days of credit.

This illustrates one of those situations where the periods of time for which credit is due on unrelated concurrent sentences will not line up with each other. Some credit will be due on one sentence and a different amount of credit will be due on another.

In these cases, the registrars shall properly compute the credit ordered against each sentence. Taking the above example, if a defendant is entitled to 10 days of credit on one two-year sentence and 150 days of credit on a concurrent two-year sentence, the registrar will compute each sentence separately and the defendant's controlling sentence will be the two-year sentence with the lesser amount of credit.

c. A sentence imposed to run concurrently with a sentence imposed earlier

In this situation, the determinative questions are the existence of a connection between any of the offender's time in custody and the offense for which sentence is being imposed and, if there is a connection, whether it was ever "severed."

Concurrent Sentence Example 3
Sauk County officials suspected Smith of committing an armed robbery in Sauk County and discover that he is serving a sentence in the Wisconsin State Prison on another charge. Sauk County filed a detainer at the prison. Six months later, Smith is convicted on the Sauk County charge and is sentenced to a term of imprisonment of 10 years, to run concurrently to the sentence he was already serving.

The judgment of conviction in Sauk County should indicate that Smith is entitled to no sentence credit under § 973.155. All the time Smith spent in custody after the filing of the Sauk County charge was spent in service of the previously imposed sentence on an

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unrelated charge. Thus, there was never a connection between the Sauk County case and Smith's custody, so no additional credit is required.[35]

> Concurrent Sentence Example 4
> Smith is arrested and charged on the same day in two separate cases, A and B, each arising from a different course of conduct. Unable to post cash bail, he remains in custody. Ninety days after his arrest he is convicted and sentenced in Case A. Sixty days later he is convicted and sentenced in Case B. The sentence is ordered to run concurrently with the sentence in Case A.

The sentencing in Case A severed the connection between Smith's custody and Case B. Thus, his custody after the first 90 days was due solely to the sentence in Case A, and the judgment of conviction in Case B should give credit only for the first 90 days.[36]

> Concurrent Sentence Example 5
> Smith was convicted of burglary and sentenced to five years of imprisonment, but execution of the sentence was stayed and he was placed on probation. He committed another burglary while on probation and was taken into custody. A probation hold was imposed, and bail, which he could not post, was set on the new charge. He was convicted of the new charge and sentenced to five years of imprisonment, to run concurrently with the sentence underlying the probation, as probation had been revoked at the same time. He spent 180 days in custody.

The judgment of conviction on the new charge should order that credit be granted for 180 days spent in custody. The department's revocation order should also reflect that 180 days credit is due on the sentence underlying the revoked probation.

When the judgment and the revocation order reach the prison, the registrar will credit each sentence with 180 days, by computing each sentence as though it had begun 180 days earlier.

(NOTE: This example assumes that no credit was due on the sentence underlying the probation for time spent in custody prior to the original sentencing on that charge. If such credit was due, it should be reflected on the original judgment of conviction and in the revocation order and would be credited by the registrar against only the first sentence.)

> Concurrent Sentence Example 6
> Smith was convicted of burglary; sentence was withheld and he was placed on probation. He committed another burglary while on probation and was taken into custody. A probation hold was imposed, and bail, which he could not

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post, was set on the new charge. His probation was revoked and after 180 days in custody he was sentenced after revocation to four years of imprisonment. Ninety days later he was convicted of the new burglary charge and sentenced to four years of imprisonment, to run concurrently with the four-year sentence imposed for the first burglary.

The judgment of conviction on the new burglary charge should order that credit be granted for 180 days spent in custody before being sentenced after revocation for the first burglary. Smith is not entitled to the additional 90 days he was in custody after the sentencing in the first case because that sentencing severed the connection between his custody and the new charge.[37]

While the credit on each judgment will be equal, the second sentence will control Smith's release date because as of the date of sentencing in the second case, he had served 90 more days of the first sentence.

(NOTE: This example also assumes that no credit was due on the sentence underlying the probation for time spent in custody prior to the original sentencing on that charge. If such credit was due, it should be reflected on the original judgment of conviction and in the revocation order and would be credited by the registrar against only the first sentence.)

Concurrent Sentence Example 7

While Smith is on extended supervision he is arrested for a new offense. He is held in custody on an ES hold and on cash bail on the new offense. Three months after his arrest his ES is revoked, and a month after revocation, he is returned to the prison system to commence reconfinement time. Two months after being returned to prison he is convicted and sentenced for the new offense and given a concurrent sentence.

The offender's custody was connected to both the ES case and the new offense until the time he was returned to prison. The return to prison severed the connection between the offender's custody and the new offense. Because the sentence for the new offense is concurrent, however, the offender is entitled to credit toward that sentence for the time between his arrest and his return to prison.[38]

Whether an offender subject to multiple charges or revocations awaits resolution of pending matters in jail or prison, whether cases are resolved at the same time or at wide intervals, or whether one case or the other is first resolved is often fortuitous. Practices differ from county to county, based on local court calendars, whether the offender will waive revocation or plead guilty, and even whether the local detention facility has available space.[39] These practices may result in disparate results in similar cases or may allow

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"persons to manipulate the system to their advantage" (as by delaying the revocation of probation, parole, or extended supervision).[40] Trial courts should be as fully informed as possible about each case so that unfair results can be avoided. If different judges are involved, it will be unlikely that each judge will be aware of the sentence credit situation in the other case when completing his or her own judgment, but the judge imposing the second sentence should try to become informed of the credit awarded against the first sentence.

2. Consecutive sentences

The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences.[41] In situations where consecutive sentences are imposed by different judges, there will have to be some communication between the two courts to assure that sentence credit is properly ordered. This can most easily be achieved by requiring the parties to come to the sentencing hearing prepared to identify any sentence credit awarded on any previously imposed sentences.

Examples of common consecutive sentence situations follow.

a. Multiple counts in a single judgment

Consecutive Sentence Example 1
Smith was arrested for two armed robberies, charged in a two-count information, and convicted of both charges on the same day. He spent one year in jail awaiting disposition. He is sentenced to serve 10 years of imprisonment on each count, the sentences to run consecutively to one another. The judgment of conviction should order that 365 days credit be granted.

If an offender with multiple charges is entitled to credit that is applicable to all of the charges and is given an imposed sentence on one charge and a consecutive imposed and stayed sentence on the others, the credit must be awarded against the first imposed sentence.[42]

b. Sentence to run consecutively to a sentence imposed by another court

Consecutive Sentence Example 2
Smith is arrested for an armed robbery in Dane County. An armed robbery charge is already pending in Sauk County, but Smith had been released on bail. He spends one year in Dane County jail awaiting trial and is then convicted and sentenced to 10 years of imprisonment, with sentence credit

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ordered for the one year he spent in jail. He pleads guilty to the Sauk County charge and is sentenced to 10 years of imprisonment, to run consecutively to the Dane County charge. Sauk County had lodged a detainer against Smith in Dane County.

The Dane County judgment should order that credit be granted for the 365 days spent in Dane County jail. When the sentencing takes place in Sauk County, the judge must be informed of the sentence and sentence credit ordered in the Dane County judgment. This should be done by the parties, who should come to the Sauk County sentencing prepared to address the sentence credit issue, ideally with a copy of the Dane County judgment.

The Sauk County judge would not order credit for the time spent in custody in Dane County, even though that custody may have been due in part to the Sauk County detainer, because the detainer is insufficient to establish a connection between the Dane County custody and the Sauk County case.[43] When the defendant reaches the institution, his total sentence will be computed as though it had begun 365 days earlier.

(NOTE: There may be other periods of custody allocable solely to the Sauk County case for which credit may be due in the Sauk County judgment.)

c. Multiple sentences with differing amounts of credit

Consecutive Sentence Example 3
Roberts is arrested for a theft and, after remaining in custody for 30 days, is released on bail. He is later arrested for a burglary and remains in custody until he is sentenced in both cases 60 days later. He is sentenced to two years of imprisonment for the theft and six years of imprisonment for the burglary, to run consecutively to the theft sentence.

The judgment of conviction for the theft conviction should include 30 days of sentence credit, while the judgment of conviction for the burglary conviction should order 60 days of sentence credit. Thus, the total consecutive sentences of eight years are reduced by the total of 90 days Roberts spent in custody before sentencing on the two cases.

d. Sentence to run consecutively to a sentence imposed following revocation of probation

Consecutive Sentence Example 4
Smith was convicted of armed robbery in 2010 and placed on probation; sentence was withheld. He was entitled to no sentence credit as a result of that episode. In 2011, he commits another armed robbery. A probation hold

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is filed against him and he is charged with the new offense. He spends one year in jail awaiting trial and revocation. He is sentenced on the new charge first and receives a 10-year sentence, with credit ordered for the one year. He then comes before the judge who imposed the original probation. A 10-year consecutive sentence is imposed.

The judgment imposed first should order credit for the one year spent in custody. The judge imposing the sentence following revocation of probation must be informed about the sentence and sentence credit ordered in the first judgment and should order no credit for time spent in custody that was awarded as credit on the first judgment.

(NOTE: If Smith had received an imposed and stayed sentence originally, or was on parole or extended supervision, the Department of Corrections would give credit on the stayed sentence or the sentence for which Smith was on parole or extended supervision for all time in custody on the new offense until the person is received at or returned to prison. Thus, in these circumstances, the judge who imposes a consecutive sentence on the new offense (which was the basis for revoking probation, parole, or extended supervision) should not grant credit for any custody on the new offense.[44])

VI. Correcting Sentence Credit Errors[45]

Since the effective date of § 973.155 in 1978, it has been required that the sentence credit determination be made part of the judgment of conviction as a finding by the court. If a determination was not made in the judgment, past practice has been to first petition the department for credit. When a determination has been made part of the judgment, any change in that determination requires an amendment of the judgment. While administrative change of the sentence credit finding might be more convenient, a finding in a judgment simply may not be amended by administrative action.

In cases where court action is required to correct a judgment, the correction process need not be a cumbersome one. First, courts should require accurate information at the time of sentencing and impress upon the parties the importance of making a correct determination initially. Second, the correction process can be simple and efficient. A number of different procedural designations could be applied to the request for correction. Regardless of how the request is categorized, it should follow the general format described below.

1. An application to correct the sentence credit determination should be made in the sentencing court.

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2. The application should specify the additional credit that is being requested—*e.g.*, to change the sentence credit determination from 50 to 75 days.

3. The application should specify the nature of each separate period of custody for which credit is being claimed—*e.g.*, 10 days in the Wood County jail after arrest and before transfer to Dodge County; 15 days in a mental health facility while competency to stand trial was being evaluated.

4. The application should identify the reason for each period of custody and must show that it was "connected with the course of conduct for which sentence was imposed."

5. Attached to the application should be confirmation by the person having custody of the offender for each period which verifies both the duration and the reason for the custody.

6. A copy of the application should be sent to the district attorney.

7. A hearing is not required but may be ordered in the discretion of the court.

8. If the sentence credit determination is corrected, an amended judgment should be prepared which reflects the proper sentence credit. The amended judgment should be promptly sent to the institution having custody of the offender.

It may happen that an error in the initial determination of sentence credit is not discovered and corrected until after an offender has served the custody portion of the sentence and has been released on parole or extended supervision. The judgment of conviction should still be amended because the additional credit reduces the offender's sentence and, therefore, the amount of time remaining on parole or extended supervision. The amended judgment should be sent to the records office of the Department of Corrections' Division of Community Corrections, which is responsible for supervision of offenders on parole or extended supervision.

The judgment should also be amended even if the error is not discovered and corrected until after the offender's parole or extended supervision has been revoked and the offender reincarcerated under § 302.11(7) or reconfined under § 302.113(9). The additional credit must be applied to reduce the length of reincarceration or reconfinement the offender serves as well as the total length of the remaining sentence.[46]

9. If the application to correct the sentence credit determination is denied, an order to that effect should be entered, and a copy sent to the person who filed the application.

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COMMENT

SM 34A was originally published in 1982 and revised in 1985, 1988, 1991, 1995, 2016, and 2018. This revision was approved by the Committee in December 2013; it involved a complete review and revision of the text and footnotes.

1. State v. Carter, 2010 WI 77, ¶51, 327 Wis.2d 1, 785 N.W.2d 516 (quoting State v. Ward, 153 Wis.2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989), and State v. Beets, 124 Wis.2d 372, 379, 369 N.W.2d 382 (1985)). Also see, State v. Obriecht, 2015 WI 66, ¶23, 363 Wis.2d 816, 867 N.W.2d 387.

2. The exception is that when a court imposing a life sentence establishes a specific date for parole eligibility under § 973.014(1)(b), time spent in custody prior to sentencing is not credited against that parole eligibility date. State v. Chapman, 175 Wis.2d 231, 499 N.W.2d 222 (Ct. App. 1993). While the court may consider the amount of credit as a factor in setting the eligibility date, the date set by the court governs. State v. Seeley, 212 Wis.2d 75, 83-88, 567 N.W.2d 897 (Ct. App. 1997).

Section 973.014(1)(b) applies only to offenses committed before December 31, 1999, when Truth-in-Sentencing took effect. However, the Truth-in-Sentencing legislation created § 973.014(1g)(a)2., which allows a court imposing a life sentence for an offense committed on or after December 31, 1999, to set a date on which the person is eligible to petition for supervised release under § 302.114(5). No published decision has addressed whether time spent in custody before sentencing should be credited against the extended supervision eligibility date set by a court, but the Committee concludes that under the rationales of Chapman and Seeley the time in custody would not be credited.

3. State v. Obriecht, 2015 WI 66, ¶23, 363 Wis.2d 816, 867 N.W.2d 387.

4. State v. Villalobos, 196 Wis.2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995).

5. Note that the statute qualifies this listing of three periods of time with the phrase "without limitation by enumeration." Thus, periods of time not listed may be creditable under § 973.155.

6. In State v. Walker, 117 Wis.2d 579, 345 N.W.2d 413 (1984), the Wisconsin Supreme Court identified the procedure that should be followed: The appropriate sentence is to be determined independently of any time previously served; only then should sentence credit be determined. For a more complete discussion see note 15, SM-34, Sentencing Procedure, Standards, And Special Issues (© 1999).

The awarding of sentence credit is a judicial function that requires a court to reach its own conclusion about the amount of sentence credit to be awarded and to explain its findings and reasoning on the record. While the court may seek assistance from its court clerk in collecting information that may be relevant to the credit determination, the awarding or denial of sentence credit is the duty of the court, not the court clerk. State v. Kitt, 2015 WI App 9, 359 Wis.2d 592, 859 N.W.2d 164.

7. Section 973.03(4)(b) expressly provides for sentence credit for periods of home detention.

8. In State v. Avila, 192 Wis.2d 870, 532 N.W.2d 423 (1995), the Wisconsin Supreme Court rejected the claim that principles of equal protection require that a period of jail time ordered as a condition of probation be reduced to reflect time spent in jail prior to trial because of indigency. The court also rejected the defendant's claim that his condition of probation jail time should be credited for prison time served

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pursuant to a conviction later reversed. The court held that the applicable statute, § 973.04, applied only to credit against subsequent "sentences" and that jail time as a condition of probation is not a sentence. Avila did not involve a claim that § 973.155 applied, but the same result should follow: that statute also requires credit only against "sentences"; time in jail ordered as a condition of probation is not a "sentence."

9. State v. Obriecht, 2015 WI 66, ¶24, 363 Wis.2d 816, 867 N.W.2d 387.

10. State v. Wolfe, 2001 WI App 66, 242 Wis. 2d 426, 625 N.W.2d 655. *See also* § 973.155(3) (computing custody as if it were served time in the institution to which the defendant has been sentenced).

11. State ex rel. Thorson v. Schwarz, 2004 WI 96, ¶¶16-29, 274 Wis.2d 1, 681 N.W.2d 914, held that a person detained or committed under Chapter 980 is not in "custody" for purposes of § 973.155. In 2005 Wis. Act 434, § 45, however, the definition of "custody" under the escape statute was amended to cover detention under Chapter 980. See § 946.42(1)(a)1.a. and 1.e. (referring to facilities under §§ 980.04(1) and 980.065 and to supervised release under Chapter 980). The amendments to § 946.42(1)(a) took effect August 1, 2006. Thus, as of that date, a person detained or committed under Chapter 980 is in "custody" for purposes of § 973.155, effectively superseding Thorson's holding to the contrary. Note, however, that Thorson also held a person's custody under Chapter 980 is not "in connection with" the predicate offense for the commitment; that holding is not changed by the amendments to the definition of "custody" in § 946.42. See note 23, below.

12. Credit is to be granted for time spent in jail as a condition of probation based both on the holding in State v. Gilbert, 115 Wis.2d 371, 340 N.W.2d 511 (1983), and on the fact that 1995 Wis. Act 154 amended the definition of "custody" in § 946.42(1)(a) to include custody in jail as a condition of probation. As to bail release, note that §§ 969.02(3)(d) and 969.03(1)(e) allow a court to set a condition of bail release that requires a defendant to return to custody after specified hours.

13. Credit should be granted when, for example, a Wisconsin offender is arrested in Illinois on a Wisconsin warrant even if the offender is also being held on Illinois charges, unless or until the offender begins serving a sentence on the Illinois charges. State v. Carter, 2010 WI 77, ¶¶31-40, 58-72, 82, 327 Wis.2d 1, 785 N.W.2d 516. Credit should not be granted when a Wisconsin offender, already in custody on Illinois charges, has a Wisconsin "hold" or detainer filed against him. This is consistent with the conclusion that filing a detainer against one already in custody in Wisconsin does not result in "custody" under § 973.155 on the charge which is the subject of the detainer. See note 24, below.

A prior version of SM-34A (© 1995) stated that a person was in "custody" in another state only if his or her custody was based exclusively on a Wisconsin warrant. This conclusion was rejected in State v. Carter, 2007 WI App 255, ¶¶11-25, 306 Wis.2d 450, 743 N.W.2d 700, aff'd, 2010 WI 77, ¶40, 327 Wis.2d 1, 785 N.W.2d 516, and was removed in the 2014 version of SM-34A.

14. State v. Baker 179 Wis.2d 655, 508 N.W.2d 40 (Ct. App. 1993).

15. State v. Sevelin, 204 Wis.2d 127, 554 N.W.2d 521 (Ct. App. 1996). Credit is not required where jail time as a condition of probation is stayed and the person is hospitalized for treatment. State v. Edwards, 2003 WI App 221, 267 Wis.2d 491, 671 N.W.2d 371.

16. State v. Riske, 152 Wis.2d 260, 448 N.W.2d 260 (Ct. App. 1989); State v. Dentici, 2002 WI App 77, 251 Wis.2d 436, 643 N.W.2d 180.

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17. A person required to remain in his home during all nonworking hours as a condition of bail pending appeal, is not entitled to credit for the period of home detention on the sentence imposed after the appeal was decided. State v. Pettis, 149 Wis.2d 207, 441 N.W.2d 247 (Ct. App. 1989).

18. See the discussion of State v. Cobb, 135 Wis.2d 181, 400 N.W.2d 9 (Ct. App. 1986). In Cobb, the court held that credit was properly denied to a probationer who was ordered, as a condition of probation, to spend either one year in jail or go to a drug abuse treatment center. He chose to participate in a drug treatment program and successfully completed it. When his probation was revoked, he sought credit for the time her spent in the program. The court held that credit was not required because there was no evidence of "custody" – defining that term, by reference to the escape statute, as "physical detention by an institution, institution guard or peace officer." 135 Wis.2d 181, 185. As discussed above in Section IV.A.1 and 2, after Cobb was decided the supreme court clarified that for purposes of sentence credit "custody" is defined not solely by physical detention, but by whether the offender is subject to an escape charge for leaving whatever status or setting her or she was in. Magnuson, 233 Wis.2d 40, ¶31.

19. In State v. Harris 168 Wis.2d 168, 483 N.W.2d 808 (Ct. App. 1992), the court held that there was no authority to grant credit for time served in a home detention program ordered under the auspices of a federal consent decree.

20. State ex rel. Simpson v. Schwarz, 2002 WI App 7, 250 Wis.2d 214, 640 N.W.2d 527.

21. A defendant held "in part" on unsatisfied cash bail on the principal charge and an unrelated charge was in custody in connection with the principal charge up until disposition of the unrelated charge. State v. Harr, 211 Wis.2d 584, 596-97, 568 N.W.2d 307 (Ct. App. 1997). Harr applied State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984) (citing a prior version of SM-34A) and State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (approving the reasoning in Gavigan).

See also State v. (Elandis) Johnson, 2009 WI 57, ¶27, 318 Wis.2d 21, 767 N.W.2d 207 (in deciding whether an offender is entitled to credit under § 973.155, the court must determine whether the person was in custody and "whether all or part of the 'custody' for which credit is sought was 'in connection with the course of conduct for which sentence was imposed'"); State v. Hintz, 2007 WI App 113, ¶8, 300 Wis.2d 583, 731 N.W.2d 646 (credit must be awarded under § 973.155(1)(b) for time in custody on an extended supervision hold if the hold was "at least in part" due to the conduct resulting in the new conviction). Cf. State v. Thompson, 225 Wis.2d 578, 593 N.W.2d 875 (Ct. App. 1999) (offender was in custody in connection with an adult charge while confined under a juvenile commitment because the adult charge led to revocation of juvenile supervision and confinement in juvenile facility).

In State v. (Marcus) Johnson, 2007 WI 107, 304 Wis.2d 318, 735 N.W.2d 505, the defendant argued for a broad interpretation of the "in connection with" language in § 973.155 based in part on the statement in the paragraph to which this note is appended that custody "must be, at least in part, the result of a legal status . . . stemming from the course of conduct for which sentence is being imposed." Id., ¶68. The supreme court rejected Johnson's "expansive interpretation" as contrary to applicable case law, in particular State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985), where, once the offender began serving a sentence on one charge, it was irrelevant that he was also awaiting trial on another charge. Id., ¶69. Because SM-34A discusses and incorporates the holdings of the applicable case law, including Beets, the Committee concluded the court's rejection of Johnson's argument did not require a revision of the language of SM-34A.

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22. State v. Beiersdorf, 208 Wis.2d 492, 498, 561 N.W.2d 749; (Ct. App. 1997); State v. Floyd, 2000 WI 14, ¶¶15-17, 232 Wis.2d 767, 606 N.W.2d 155; State v. (Elandis) Johnson, 2009 WI 57, ¶33, 318 Wis.2d 21, 767 N.W.2d 207. See also State ex rel. Thorson v. Schwarz, 2004 WI 96, ¶34, 274 Wis.2d 1, 681 N.W.2d 914, which held that time spent in the Wisconsin Resource Center pending a Chapter 980 commitment trial is not "in connection with" the sentence on a criminal offense that served as one of the predicates for the Chapter 980 petition.

23. State v. (Elandis) Johnson, 2009 WI 57, 318 Wis.2d 21, 767 N.W.2d 207. See also note 34, below.

24. "Custody" as used in § 973.155 must result "from the occurrence of a legal event, process, or authority which occasions, or is related to, confinement on the charge for which the defendant is ultimately sentenced." State v. Demars, 119 Wis.2d 19, 26, 349 N.W.2d 708 (Ct. App. 1984) (communication of a detainer which carried no custodial mandate was not sufficient to establish connection with the case in which the detainer was filed); State v. Nyborg, 122 Wis.2d 765, 768, 364 N.W.2d 553 (Ct. App. 1985) (same); State v. Villalobos, 196 Wis.2d 141, 147-48, 537 N.W.2d 139 (Ct. App. 1995) (entry in a jail log indicating an outstanding arrest warrant from another county was not "occurrence of a legal event, process, or authority" sufficient to establish connection between basis for custody and charges for which warrant was issued). Cf. State v. Carter, 2007 WI App 255, ¶¶14-18, 306 Wis.2d 450, 743 N.W.2d 700, aff'd as modified as to number of days of credit granted, 2010 WI 77, ¶¶9, 33-34, 81-82, 327 Wis.2d 1, 785 N.W.2d 516 (arrest of defendant in Illinois on Wisconsin warrant established a connection between custody and Wisconsin course of conduct).

25. State v. Gavigan, 122 Wis.2d 389, 393, 362 N.W.2d 162 (Ct. App. 1984) (citing a prior version of SM-34A). The reasoning in Gavigan was approved by the supreme court in State v. Beets, 124 Wis.2d 372, 380-81, 369 N.W.2d 382 (1985). See also State v. Carter, 2010 WI 77, ¶37, 327 Wis.2d 1, 785 N.W.2d 516 ("...once a defendant is actually serving the sentence on a charge, the defendant is not entitled to credit for presentence custody toward sentences on unrelated charges, although trial may be pending on the separate charges at the time the defendant is serving the first sentence.").

26. An offender's custody may preclude establishment of a connection with a course of conduct even if the custody is not due to service of a criminal sentence. In State v. Riley, 175 Wis.2d 214, 498 N.W.2d 884 (Ct. App. 1993), the defendant escaped from jail confinement ordered as a condition of probation. He was eventually arrested after committing a new crime during the period of escape. He was returned to jail to continue serving the original condition-of-probation confinement and cash bail was set on the new charge, which Riley did not post. At the completion of the condition of probation confinement, Riley was sentenced on the new charge. The court of appeals held that credit for the time spent in jail as a condition of the original probation was not due against the new sentence because § 973.155 "does not authorize credit for a term of confinement ordered [as a consequence] for prior criminal activity irrespective of whether that confinement is a condition of probation or as the result of a sentence after revocation of probation." Id., 220-21, citing State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985). See also State v. Villalobos, 196 Wis.2d 141, 144-46, 537 N.W.2d 139 (Ct. App. 1995) (applying Riley to similar facts).

Further, a defendant already in custody under a juvenile commitment was not entitled to credit toward an adult battery charge he committed while confined in a juvenile correctional institution based on a previous unrelated delinquency adjudication. State v. (Marcus) Johnson, 2007 WI 107, 304 Wis.2d 318, 735 N.W.2d 505. Because Johnson's juvenile commitment order pre-existed the battery charge, it precluded the creation of a connection between Johnson's custody and the battery charge. Id., ¶63. Nor

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was a connection created when Johnson's commitment was later extended based in part on the conduct giving rise to the battery charge because, the court concluded, the commitment would have been extended even if the battery had not occurred. Id., ¶71. The court distinguished State v. Thompson, 225 Wis.2d 578, 593 N.W.2d 875 (Ct. App. 1999), [cited above, in note 18,] on the grounds that Thompson's custody was both connected to the new charge, which had been a basis for the revocation of juvenile supervision, and was for treatment in the juvenile system, not continuing punishment of the original offense. Id., ¶¶45-55.

Note, however, that custody under a civil commitment for contempt does not preclude a connection between the custody and a pending criminal charge. Unlike a person serving a sentence, as in Beets, jail time as a condition of probation, as in Riley, or a juvenile commitment, as in (Marcus) Johnson, a person confined under a civil contempt commitment would not necessarily be in custody absent the pending criminal charge because the person may obtain release by meeting the contempt commitment's purge conditions. State v. Trepanier, 2014 WI App 105, ¶¶20-21, 357 Wis.2d 662, 855 N.W.2d 465.

27. In State v. Beiersdorf, 208 Wis.2d 492, 561 N.W.2d 749 (Ct. App. 1997), the defendant posted a personal recognizance bond on a sexual assault charge and remained on that bond until his sentencing. He was, however, held in custody on cash bond on later charges of bail jumping based on violations of the recognizance bond in the sexual assault case. He was sentenced to prison on the sexual assault charge; his sentence on the bail jumping charge was imposed and stayed and he was placed on probation, to run consecutively to the prison sentence for sexual assault. The court of appeals concluded Beiersdorf was in custody only "in connection with" the course of conduct for which sentence was imposed and stayed. Thus, no credit is due on the prison sentence for sexual assault.

28. State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984) (discussed in detail in note 34, below); State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (discussed in detail in note 35, below). While sentencing on one charge may be the most common event that will sever the connection, it is not the only one. In State v. Harr, 211 Wis.2d 584, 596, 568 N.W.2d 307 (Ct. App. 1997), the court concluded that the offender's commitment under § 971.17 after being found not guilty by reason of mental disease or defect severed the connection between his custody and an unrelated pending charge.

Not every event that creates an independent basis for legal custody "severs" the connection between an offender's custody and a pending criminal case. To sever the connection, the event must have put the offender in a status that would keep the offender in custody even in the absence of the criminal case. For instance, in State v. Trepanier, 2014 WI App 105, 357 Wis.2d 662, 855 N.W.2d 465, an offender who was already in custody on cash bail in a criminal case was found in contempt for failing to pay a fine in an unrelated case and ordered to be held in custody under the contempt order unless he met the purge condition. The subsequent contempt order did not sever the connection between the custody and the criminal case because, unlike the offender in Beets, who would have been in custody under the sentence imposed even in the absence of the pending criminal case, Trepanier could have obtained release from the contempt order by satisfying the purge conditions. Id., ¶¶15-21.

29. State v. Floyd, 2000 WI 14, ¶32, 232 Wis.2d 767, 606 N.W.2d 155. The court in Floyd disclaimed reliance on the "in connection with the course of conduct" language in § 973.155 and instead relied on the phrase "related to an offense for which sentence was imposed," finding the unique nature of read-in offenses made them "related" to offenses for which a defendant is sentenced for purposes of § 973.155(1).

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Floyd limits its holding to offenses that are "read in" for sentencing purposes. 232 Wis.2d 767, ¶30. Thus, Floyd does not require credit to be given for custody related to every offense that a judge "considers" at sentencing. See State v. Piggue, 2016 WI App 13, 366 Wis.2d 605, 875 N.W.2d 663. In Piggue, the defendant was in custody on a sexual assault charge when he tried to persuade the victim not to testify against him. He was acquitted of the sexual assault, but was then charged with and convicted of witness intimidation. The judge considered the sexual assault allegations when sentencing Piggue on the intimidation charge, so Piggue argued that Floyd required the time he spent in custody on the sexual assault charges to be credited toward the intimidation sentence. The court of appeals held that Floyd should not be extended beyond its express limitation to "read-in" offenses. 366 Wis.2d 605, ¶¶12-13.

30. As noted above, in Section IV.B.2 of this Special Material, once a person begins serving one of the sentences, his "custody" is no longer "in connection with" the other pending charge. Credit on the sentence for that pending charge will be due only for the days when both charges were pending, prior to the commencement of the other sentence. State v. Beets, 124 Wis.2d 372, 369 N.W.2d 352 (1985). For cases applying Beets to offenders who are revoked from extended supervision for new charges and given a sentence on the new charges concurrent to the sentence on which supervision was revoked, see State v. Hintz, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646; State v. Presley, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2D 713; and State v. Davis, 2017 WI App 55, 377 Wis.2d 678, 901 N.W.2d 488. This situation is discussed below, Section V.C.1.c, this Special Material. For a discussion of credit in consecutive sentence situations, see below, Section V.C. (intro.) and 2, this Special Material.

31. The defendant in Tuescher won a new trial on an attempted homicide charge arising out of an incident involving a burglary and shooting. The attempted homicide conviction was reversed, and while it was being relitigated he remained in custody serving the sentences imposed for two other charges arising out of the incident. After he was convicted and sentenced again on the attempted homicide, Tuescher sought credit toward the new sentence for his time in custody between winning the new trial and being resentenced. The defendant was not entitled to the credit because during that time he was serving the sentences imposed on the charges which were not retried. 226 Wis.2d 465, 467.

32. See Wis. Stat. § 946.42(1)(a)1.h., and State v. Gilbert, 115 Wis.2d 371, 340 N.W.2d 511 (1983). The question of credit for time spent in jail as a condition of probation was an open one at the time SM-34A was originally published. That version recommended that credit be granted for such time. The Committee's conclusion was adopted in Gilbert, which held that the plain meaning of § 973.155 required that credit be given: "there is no basis for interpreting the statute as excluding custody as a condition of probation from the statute's coverage." 115 Wis.2d 371, 377.

Because jail time as a condition of probation is not a sentence, any "good time" the circuit court allowed the offender to earn while serving the conditional jail time is not eligible for sentence credit under 973.155(4); that statute provides for sentence credit to include "good time" only for sentences of one year or less. State ex rel Baade v. Hayes, 2015 WI App 71, 365 Wis.2d 174, 870 N.W.2d 478.

33. This principle was cited with approval and applied in State v. Ward, 153 Wis.2d 743, 452 N.W.2d 158 (Ct. App. 1989).

34. State v. (Elandis) Johnson , 2009 WI 57, ¶¶50-60, 318 Wis.2d 21, 767 N.W.2d 207, criticized a prior version of SM-34A (© 1995) that referred to crediting equally all concurrent sentences "imposed at the same time or for offenses arising from the same course of conduct." The court found this formulation "unfortunate" because it was "too broad" and had led to the belief that when concurrent sentences are

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imposed at the same time, any credit is to be applied against each of the sentences imposed regardless of whether the custody was factually connected to each sentence. Noting that the "unfortunate" passage was more understandable, if still inaccurate, when read in context with the examples in the Special Material, the court made it clear that any custody applied to any given sentence must also be factually connected to that sentence. Id., ¶¶61-68. As applied to Johnson's case, the court held:

> ¶47 Calculating the correct number of days that need to be credited to each of Johnson's concurrent sentences requires that we examine separately each sentence and the time spent in presentence custody "in connection with" each sentence. We cannot, as Johnson's argument attempts to do, conflate all the concurrent sentences imposed on the same day and make a credit determination as if there were only one overall sentence imposed.

The language criticized in (Elandis) Johnson was removed in the 2014 version of SM-34A.

35. When credit has been granted against an earlier sentence which was completely served before sentencing on a new offense, no credit against the new sentence is required. State v. Morrick, 147 Wis.2d 185, 432 N.W.2d 654 (Ct. App. 1988); State v. Amos, 153 Wis.2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989); State v. Jackson, 2000 WI App 41, ¶19, 233 Wis.2d 231, 607 N.W.2d 338.

See also State v. Rohl, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991) (defendant not entitled to credit for time served in California while he was on Wisconsin parole because he had received full credit for the time toward the sentence he completed in California); State v. Martinez, 2007 WI App 225, 305 Wis.2d 753, 741 N.W.2d 280 (reaching the same conclusion with respect to time served in a federal institution); State v. Coles, 208 Wis.2d 328, 559 N.W.2d 599 (Ct. App. 1997) (a defendant who was sentenced on one count to a "time served" sentence that used all his pretrial credit was not entitled to any of that credit toward a sentence on a second count because the sentence on the second count was effectively consecutive).

36. State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984). Gavigan committed a robbery on September 15, 1982. About 24 hours later, he led police on a high speed chase that resulted in a charge of fleeing an officer. Thirty-nine days after his arrest, he pleaded guilty to the fleeing charge and was sentenced to six months in jail. One hundred and seven days later Gavigan was sentenced on the robbery – a three-year sentence to run concurrently with the six-month sentence on the misdemeanor. The trial judge gave 39 days credit on the three-year sentence.

Gavigan claimed he should also receive credit for the 107 days that followed the misdemeanor sentence but preceded the robbery sentence. The court of appeals affirmed the denial of credit for the 107 days, holding that the custody was not "in connection with" the robbery charge – it was attributable solely to the misdemeanor conviction.

37. See State v. Beets, 124 Wis.2d 372, 369 N.W.2d 352 (1985). Beets was convicted of drug offenses and placed on probation with sentence withheld. He was arrested on a burglary charge and held in custody for that charge. Within a few days, a probation hold was added. The hold was based on the burglary charge.

Seventy-eight days after his arrest, Beets' probation was revoked and two concurrent three-year sentences were imposed. He received credit for the 78 days and went to prison.

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One hundred and ninety-two days after his prison sentence began, Beets was sentenced on the burglary. He received a three-year sentence concurrent with the sentence he was already serving. He received 78 days credit for the time spent in custody before the first sentence was imposed (when both the revocation and the burglary charge were pending).

Beets sought credit for the 192 days that elapsed after his first prison sentence began, while the burglary charge was pending.

The supreme court affirmed the trial court's denial of credit, holding that confinement after the first sentence was imposed could not be "in connection with" the pending burglary charge. Thus, § 973.155 does not require credit, because the charges resulting in the first sentence and the pending charges were not "related." The court stated that "unless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the pending charges." Id., 383.

The rule in Beets that sentencing on a related charge "severs the connection" was applied in State v. Abbott, 207 Wis.2d 624, 558 N.W.2d 927 (Ct. App. 1996). Abbott committed a battery while serving a sentence under the Division of Intensive Sanctions (DIS) program. He received a sanction of 89 days in jail. Later, he pled guilty to the battery and was sentenced. The court of appeals held Abbott was not entitled to credit on the battery sentence for time spent in jail for the DIS sanction. Any connection between the two sentences was severed when Abbott began serving the DIS sanction. See also State v. Hintz, 2007 WI App 113, ¶7 n.3, 300 Wis.2d 583, 731 N.W.2d 646 (applying Beets to offender revoked from extended supervision for new charges and given a sentence on new charges concurrent to sentence on which supervision was revoked).

However, Beets does not mean every sentencing "severs" the connection between custody and charges unrelated to the one on which the sentence is imposed. In State v. Yanick, 2007 WI App 30, 299 Wis.2d 456, 728 N.W.2d 365, the defendant was serving six months of confinement as a condition of probation for an OWI offense. While serving that condition time he was sentenced in an unrelated case. That sentence began running while he was serving condition time and was longer than the condition time. When his probation on the OWI was revoked, he was entitled to credit toward the revocation sentence for the condition time despite the fact much of that time was concurrent to the sentence in the unrelated case:

> ¶ 22 To the extent the State is suggesting that Beets holds that service of a sentence on crime A always "severs" time in custody owing to crime B for purposes of awarding sentence credit on the sentence for crime B, we disagree. Beets addressed a particular type of status--time in custody serving a sentence and awaiting disposition on a separate crime. Beets does not address service of a sentence and concurrent service of custody time pursuant to a disposition, which is the sort of concurrent custody time at issue here.

Because Yanick was ultimately sentenced for the OWI for which he was confined as a condition of probation, his custody was factually connected to the course of conduct for which sentence was imposed. See also State v. (Elandis) Johnson, 2009 WI 57, ¶¶42-44, 318 Wis.2d 21, 767 N.W.2d 207 (discussing Yanick).

Similarly, in a decision that does not refer to Beets or the "severance" concept, the court of appeals held in State v. (Kevin) Brown, 2006 WI App 41, 289 Wis.2d 823, 711 N.W.2d 708, that an offender should receive credit for time served in a federal institution after a Wisconsin sentence was imposed and the

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offender was taken into custody by federal authorities and sentenced to federal prison. The decision was based on § 973.15(5), which requires credit under § 973.155 when an offender convicted here is "made available" to the authorities of another jurisdiction. Section 973.15(5) effectively creates a connection between the offender's Wisconsin case and the custody in the other jurisdiction that cannot be severed by sentencing in the other jurisdiction.

38. State v. Hintz, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646. Hintz asked only for confinement up to his reconfinement hearing, which for purposes of § 973.155 is essentially a sentencing hearing. See State v. Presley, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2d 713. Courts no longer determine the amount of reconfinement after revocation of extended supervision, so the reconfinement hearing is not the point at which the offender's sentence begins running again; instead the sentence resumes running when the person is returned to prison. Wis. Stat. § 304.072(4). State v. Davis, 2017 WI App 55, 377 Wis.2d 678, 901 N.W.2d 488.

39. Depending on the situations, sentences begin to run or resume running at different times.

a) Sentences to confinement commence on the date of imposition. Wis. Stat. § 973.15(1). This provision covers situations in which sentence was originally withheld and probation imposed.

b) Following revocation of probation in the imposed-and-stayed-sentence-probation-imposed case, the sentence commences when the offender arrives at the prison. The revocation date is irrelevant. Wis. Stat. § 973.10(2)(b).

c) Sentences of revoked parolees or persons on extended supervision resume running on the date the person is received at the correctional institution. Wis. Stat. § 304.072(4).

40. State v. Beets, 124 Wis.2d 372, 383, 369 N.W.2d 382 (1985).

41. The Wisconsin Supreme Court approved of this general principle in State v. Boettcher, 144 Wis.2d 86, 423 N.W.2d 533 (1988), reversing 138 Wis.2d 292, 405 N.W.2d 767 (Ct. App. 1987). The essential dates and facts were as follows:

4/12/86	Boettcher, on probation with a three year stayed sentence, is arrested for a new offense; a probation hold is imposed.
4/22/86	Initial appearance on new charge; signature bond on new charge; probation hold remains in effect so Boettcher remains in custody.
7/23/86	Probation is revoked and the three year stayed sentence takes effect – on that sentence, credit for all days in custody from 4/12 through 7/23 (110 days) is awarded; sentence is imposed on new offense – 1 year to run consecutively to the other sentence – and no credit for time in custody is given.

The court of appeals held that additional credit should have been given on the sentence for the new crime for the 10 days between 4/12 and 4/22 – the time after arrest and before he was "released" on a signature bond for the new offense. (Of course, he was not released; he remained in custody on the probation hold.) The court reasoned that he was "in custody" on the new offense for this period and credit

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must be given against the eventual sentence on that offense. This is the case even though he received credit for that 10-day period on the other sentence resulting from the revoked probation.

The supreme court reversed the court of appeals, concluding "that dual credit is not permitted – that the time in custody is to be credited to the sentence first imposed – and that, where the sentences are consecutive, the total time to be served is thus reduced by the number of days in custody as defined by sec. 973.155, Stats. Credit is to be given on a day for day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively." 144 Wis.2d 86, 87.

This holding is consistent with SM-34A, which the court cited with approval:

> We agree with, and endorse, the position of the Wisconsin Criminal Jury Instructions Committee's language in SM-34A V.B., where, in discussing consecutive sentences, it concludes:
>
> "The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences." 144 Wis.2d 86, 101.

The Boettcher rule also applies where a sentence has already been served: "The core idea of Boettcher is that 'dual credit is not permitted' where a defendant has already received credit against a sentence which has been, or will be, separately served." State v. Jackson, 2000 WI App 41, ¶19, 233 Wis.2d 231, 607 N.W.2d 338. See also State v. Coles, 208 Wis.2d 328, 334, 559 N.W.2d 599 (Ct. App. 1997) (a defendant who was sentenced on one count to "time served" in an amount equal to his pretrial credit was not entitled to any credit on the prison sentence imposed for a second count; the prison sentence was consecutive to the "time served" sentence because the "time served" sentence was completed upon pronouncement of sentence); State v. Rohl, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991) (applying Boettcher to deny defendant credit for time served in California while he was on Wisconsin parole before his Wisconsin parole was revoked; because his parole was not revoked until after he was released in California and returned to Wisconsin, his post-revocation Wisconsin sentence was consecutive, not concurrent, to the California sentence); State v. Martinez, 2007 WI App 225, 305 Wis.2d 753, 741 N.W.2d 280 (reaching the same conclusion with respect to time served in a federal institution before the person's Wisconsin parole was revoked).

Further, the Boettcher rule applies when one of several concurrent sentences is vacated and, after resentencing, is ordered to run consecutively to the previously imposed sentences with which it was originally running concurrent. State v. Lamar, 2011 WI 50, ¶¶35-37, 334 Wis.2d 536, 799 N.W.2d 758. Lamar was serving two concurrent sentences. He successfully challenged his conviction, but by the time he did so one of the sentences was finished. After he was reconvicted, the court imposed a new sentence, ordered it to run consecutively to any other sentence, and denied Lamar credit for the time he had served on the sentence that discharged before his conviction was vacated. The supreme court affirmed, holding "the time for which Lamar seeks credit was served on a separate, non-concurrent sentence. If Lamar received the sentence credit he seeks, he would receive dual credit from two consecutive sentences [for the same period of time]. As this court held in Boettcher, defendants are not entitled to receive this dual credit on a consecutive sentence." 334 Wis.2d 536, ¶37 (citing a previous version of this Special Material). The court also concluded that § 973.04 – which requires credit for confinement previously served when a sentence is vacated and a new sentence imposed—was not inconsistent with application of Boettcher and that denial of the credit did not violate the prohibition against double jeopardy. 334 Wis.2d 536, ¶¶35, 43-50.

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Finally, the Boettcher rule applies to cases in which an offender is seeking credit against consecutive sentences for a period of pretrial custody in two separate cases. State v. Trepanier, 2014 WI App 105, ¶14, 357 Wis.2d 662, 855 N.W.2d 465. Trepanier was in custody in both a pending criminal case and a civil commitment for contempt. When he was sentenced in the criminal case the judge ordered the sentence to run consecutively to the civil commitment. Boettcher did not preclude awarding credit for the time Trepanier was in both pretrial custody for the criminal case and custody under the civil commitment because the custody for the civil commitment was not pretrial custody. Id., ¶¶12-14.

42. State v. Wolfe, 2001 WI App 66, 242 Wis.2d 426, 625 N.W.2d 655.

43. See note 23, above.

44. Note, however, that if supervision has not yet been revoked, ordering the credit for the new offense may be required. In State v. (Eliseo) Brown, 2010 WI App 43, 324 Wis.2d 236, 781 N.W.2d 244, the defendant was held in custody in connection with a Wisconsin case and an Illinois parole hold. He was sentenced in Wisconsin first, and given a sentence consecutive to any other sentence. The circuit court denied him credit for his custody time on the theory Illinois might grant it to him, and thus give him improper "double credit." The court of appeals held it must be applied to the Wisconsin sentence, as the question of "double credit" was not ripe because Illinois had not revoked his parole yet, and to deny credit on this sentence might mean he would never get it at all.

45. This section discusses the modification or correction of a sentence to reflect sentence credit where none, or an allegedly inadequate amount, had originally been given. See State v. Amos, 153 Wis.2d 257, 279-82, 450 N.W.2d 503 (Ct. App. 1989), for a case where a sentence was amended to eliminate sentence credit to which the defendant was not entitled.

46. State v. Obriecht, 2015 WI 66, ¶¶33-36, 42-47, 363 Wis.2d 816, 867 N.W.2d 387. Obriecht addressed the application of credit to an offender reincarcerated under § 302.11(7), which governs parole revocation, but § 302.113(9), which governs extended supervision revocation, is essentially identical to § 302.11(7). Thus, the Committee concludes Obriecht's holding will also apply to offenders who have been reconfined under § 302.113(9).

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SM-35 INCREASED PENALTY FOR HABITUAL CRIMINALITY — § 939.62

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Scope

This Special Material addresses issues arising in implementing Wisconsin's "repeater" statute — § 939.62. The formal title for the provision is "increased penalty for habitual criminality," but the commonly used term "repeater" is employed here. This addresses the generally applicable repeater provisions set forth in subsections (1), (2), and (3) of § 939.62.[1] Not addressed is the "persistent repeater" provision in § 939.62(2m)[2] or the several crime-specific repeater provisions that now exist.[3]

Issues arise at several stages of the criminal prosecution: when repeater status is alleged in the charging document; when a plea of guilty is accepted; when proof of repeater status is made; when the trial court makes the formal finding of repeater status; and when the repeater-enhanced sentence is imposed. There are also substantive issues concerning the timing of offenses and convictions, how the repeater statute's time periods are affected by periods of incarceration, and how the repeater statute is applied to specific statutory violations.

I. Alleging Repeater Status

A. Before Arraignment or Plea

If the State seeks to establish that a defendant is a repeat offender and thus eligible for an enhanced sentence, it must allege the defendant's prior convictions "in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea." § 973.12(1).

The Wisconsin Supreme Court has recognized that the time of arraignment or plea acceptance is "the cut-off point after which time a defendant can no longer face exposure to repeater enhancement for the crime" charged. State v. Martin, 162 Wis.2d 883, 900, 470 N.W.2d 900 (1991). This cut-off point is strict and applies regardless of the type of plea entered by the defendant. When a repeater allegation is improperly added after the deadline, it is of no effect and must be vacated. Proof of prejudice is irrelevant. Finally, the portion of § 973.12(1) which allows for time to investigate the defendant's possible prior convictions before a plea is accepted does not extend the period for alleging repeater status beyond the time of arraignment or plea acceptance or entry. Martin, 162 Wis.2d 883, 906.

B. Amending a Repeater Allegation

A charging document may be amended after arraignment or plea acceptance to correct an error in the portion dealing with repeater status if the amendment does not prejudice the defendant. In State v. Gerard, 189 Wis.2d 505, 509, 525 N.W.2d 718 (1994), the court allowed the correction of the portion of the information which dealt with the extent of the penalty because that portion was not required by § 973.12(1) and because

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the amendment did not prejudice the defendant. An amendment of this type is not prohibited by § 973.12(1) because the allegation of a defendant's prior convictions will still have been made prior to arraignment and plea acceptance. Therefore, the amendment will be allowed unless there is prejudice to the defendant.

Applying Martin and Gerard, the Wisconsin Court of Appeals has held that "where the information correctly alleges a defendant's repeater status, a post-arraignment amendment to the information does not violate § 973.12 as long as it does not affect the sufficiency of the notice to the defendant concerning his or her repeater status." State v. Campbell, 201 Wis.2d 777, 785, 549 N.W.2d 501 (Ct. App. 1996).

A post-arraignment or post-plea amendment to the charging document alleging a provable prior conviction after the State failed to prove the prior conviction included in the original charging document will not be allowed. An amendment of that sort violates due process because the defendant has not been sufficiently notified of possible punishment at the time of arraignment or plea. State v. Wilks, 165 Wis.2d 102, 110, 477 Wis.2d 632 (Ct. App. 1991).

C. Dismissal and Refiling

When a repeater allegation has not been timely filed, or if there is an error in the allegation, the State may move for dismissal of the complaint without prejudice and, if the motion is granted, issue a new complaint that includes a proper repeater allegation. State v. Larsen, 177 Wis.2d 835, 839-40, 503 N.W.2d 359 (Ct. App. 1993).

II. Methods of Proving Repeater Status

Before sentencing a defendant to the enhanced periods set forth in § 939.62, the prior convictions serving as a basis for the penalty increase must be "admitted by the defendant or proved by the State." § 973.12.

The Wisconsin Court of Appeals has emphasized that "[w]hen the State seeks an enhanced sentence based upon a repeater allegation, it must carry the burden to prove that allegation. While a prior conviction is not an element of the charged offense, it is an essential element of proof **to be satisfied at sentencing** if the State is to secure the additional punishment it seeks." State v. Koeppen, 195 Wis.2d 117, 129-30, 536 N.W.2d 386 (Ct. App. 1995), emphasis in original, citing State v. Goldstein, 182 Wis.2d 251, 260, 513 N.W.2d 631 (Ct. App. 1994).

The necessary proof can be accomplished in either of two ways:

(a) by the defendant's personal admission of the priors; or (b) by proof of the priors by reference to an official record, preferably by furnishing the court with copies of the judgment of conviction.

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A. By the Defendant's Personal Admission

An admission of the validity of the prior convictions should be made by the defendant personally, on the record. An admission may not "be inferred nor made by a defendant's attorney, but rather, must be a direct and specific admission by the defendant." State v. Koeppen, supra, 195 Wis.2d 127, citing, State v. Farr, 119 Wis.2d 651, 659, 350 N.W.2d 640 (1984).

In guilty plea cases, it is sufficient to cover this step with a specific question during the plea acceptance colloquy. SM-32, Accepting A Plea Of Guilty, includes the following question:

"Were you convicted of (name of offense) on (date)?"

Adding a question like this was suggested by the court of appeals in State v. Goldstein, supra, 182 Wis.2d 251, 261:

> One simple and direct question to the defendant from either the prosecutor or the trial judge asking whether the defendant admits to the repeater allegation will, in most cases, resolve the issue. We suggest that trial judges include this question in their colloquy with the defendant at the plea hearing (if there is one) or, otherwise, at the time of sentencing.

The Wisconsin Supreme Court has given similar advice in a case involving sentencing as a repeater after a jury trial:

> The trial court may ask the defendant the direct question while observing the defendant's criminal record before him whether the defendant was convicted on a particular date of a specific crime. . . .

State v. Farr, supra, 119 Wis.2d 651, 659.

The question in SM-32 is modelled after the one suggested in Farr. If the question is being used to fulfill the proof of prior conviction element, it must be asked before the defendant is sentenced. Koeppen, 195 Wis.2d at 130.

B. By Copy of the Judgment of Conviction

The most direct method of proving prior convictions is to provide a certified copy of the judgment(s) of conviction. Section 973.12(1) provides in part as follows:

> An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported.

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Any official report specific enough to identify the defendant, the crimes, and the date of the convictions is sufficient. See Farr, supra, 119 Wis.2d at 660. A presentence report qualifies. Id.

Whether a court may satisfy the proof requirement by taking judicial notice of court records in the same county is an open question. However, even if the use of judicial notice would be acceptable, it must still be used prior to sentencing. Koeppen, 195 Wis.2d at 131 (the use of judicial notice at a postconviction proceeding to correct the failure to prove prior convictions at sentencing is not effective because it is too late).

III. Substantive Issues

A. Timing of Offenses and Convictions

A defendant will be eligible for enhanced punishment as a repeat offender "if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. . . ." § 939.62(2); State v. Midell, 40 Wis.2d 516, 527, 162 N.W.2d 54 (1968); Goldstein, 182 Wis.2d at 259. The date the judgment or judgments of conviction were entered determine the date for measuring the 5-year period. State v. Mikrut, 212 Wis.2d 859, 569 N.W.2d 765 (Ct. App. 1997).

B. Misdemeanor Convictions

The phrase "convicted of a misdemeanor on three separate occasions," as used in § 939.62(2), does not require that three misdemeanor convictions occur in three separate court appearances. State v. Wittrock, 119 Wis.2d 664, 674, 350 N.W.2d 647 (1984). The focus is on the quantity of crimes committed and not the date of each conviction. "Whenever a misdemeanant is convicted of a fourth misdemeanor which was committed subsequent to the convictions of three prior misdemeanors, the defendant's sentence may be enhanced by the repeater statute." Id.

Because the focus is on the quantity of misdemeanors committed, a defendant's sentence may be enhanced even if the three misdemeanors serving as the basis for repeater status were committed as part of a single incident or transaction. State v. Hopkins, 168 Wis.2d 802, 810, 484 N.W.2d 549 (1992). "[T]hree convictions of misdemeanors during the five-year period satisfies the statute, regardless of when the misdemeanors were committed." Id.

In the Committee's judgment, a misdemeanor conviction expunged under § 973.015 cannot be the basis for a repeater finding. Section 939.62(2) requires that "convictions remain of record and unreversed"; an expunged conviction does not "remain of record."[4]

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C. Periods of Incarceration

When a court calculates the 5-year period between the commission of the present offense and the conviction of any prior offenses, "time which the actor spent in actual confinement serving a criminal sentence shall be excluded." § 939.62(2).

The charging document need not include the period of incarceration served by the defendant even if the period between the commission of the present crime and the defendant's prior conviction(s) is greater than 5 years. State v. Squires, 211 Wis.2d 873, 879, 565 N.W.2d 309 (Ct. App. 1997).

Where the period between the commission of the present crime and the conviction for any prior crimes exceeds five years and the defendant had been imprisoned during that period, the length of the period of confinement must either be admitted by the defendant or proved by the State. State v. Goldstein, 182 Wis.2d at 260 (the defendant's admission that he spent "10 months, about" in prison was inadequate to satisfy the proof of the element).

The Wisconsin Court of Appeals has suggested the use of the following question to obtain an adequate admission from the defendant: "For what period of time was the defendant incarcerated as a result of the conviction?" Zimmerman, 185 Wis.2d at 559.

If an adequate admission cannot be obtained from the defendant, the State must prove the period of incarceration in the same way it is required to prove the defendant's prior convictions. Goldstein, 182 Wis.2d at 260-61.

IV. Sentencing

Section 939.62 applies only where the court wishes to impose a sentence beyond the statutory maximum for the crime of which the defendant was convicted. So, even if repeater status was properly alleged and proved, the penalty increases come into play only if the sentencing judge imposes a sentence in excess of the regular maximum for the crime. If the court imposes a sentence within the regular statutory range, it is error to attribute any part of that sentence to repeater status under § 939.63. Harris, 119 Wis.2d at 625. Relying on the § 939.62 to enhance a sentence within the statutory maximum is an abuse of discretion and a specific increase imposed for repeater status will be dropped from the sentence. Id. See also State v. Vinson, 183 Wis.2d 297, 313-15, 515 N.W.2d 314 (Ct. App. 1994).

However, a sentencing judge's mistaken reference to a defendant's status as a repeat offender will not automatically constitute an abuse of discretion. If the judge offers specific findings upon which the sentence was based and does not specifically state that the sentence is being enhanced due to the repeat offender statute, an abuse of discretion will not be found even if the judge mistakenly refers to the defendant as a

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repeat offender or if the judge correctly refers to the defendant as a repeat offender but imposes a sentence below the statutory maximum. Farr, 119 Wis.2d at 661-63.

A. Correctly Stating a Repeater Sentence

The factfinding for proof of prior convictions is to be done by the trial court. Block v. State, 41 Wis.2d 205, 211, 163 N.W.2d 196 (1968). If the court desires to impose a sentence greater than the regular statutory maximum, it must "make a finding that the defendant is a repeater." State v. Harris, 119 Wis.2d 612, 619-20, 350 N.W.2d 633 (1984). The findings must specifically articulate the basis for the repeater status on the facts on record. Id.

Section 939.62(1) provides that if a person qualified as a repeater, maximum sentences are increased as follows:

- a maximum of one year or less may be increased to not more than 3 years.

- a maximum of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

- a maximum of more than ten years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.

If the defendant's status as a repeater under § 939.62 has been properly alleged and proved, and if the sentencing court has concluded that a sentence in excess of the regular statutory maximum is appropriate, the sentence should be correctly stated on the record and reflected in the judgment of conviction. The court should state that the defendant's status as a repeater has been established, identify the increased sentence that § 939.62 allows, and then state the sentence that is being imposed. Again, the term of years imposed must be in excess of that authorized by the statutory maximum for the crime and within the increased penalty allowed by § 939.62. The court should not indicate that any particular portion of the sentence is attributed to the defendant's repeater status, but a statement to that effect will not constitute reversible error. See § 973.12(2) and State v. Upchurch, 101 Wis.2d 329, 335, 305 N.W.2d 57 (1981), cited in Harris, 119 Wis.2d 612, 625.

B. Multiple Counts; Consecutive or Concurrent Sentences

If a defendant is being sentenced for multiple counts and is a repeat offender, the sentence for all or any of the separate counts may be increased accordingly. Melby v. State, 70 Wis.2d 368, 384, 234 N.W.2d 634 (1975).

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The imposition of consecutive sentences is not a condition to the use of an enhanced penalty under § 939.62, Stats. State v. Davis, 165 Wis.2d 78, 83, 477 N.W.2d 307 (Ct. App. 1991). The phrase "maximum term of imprisonment," as used in § 939.62, refers only to each individual crime and does not contemplate the total sentence for multiple count convictions. Therefore, each count in a multiple count conviction may be enhanced under § 939.62, even if the individual sentences are imposed concurrently. Id.

C. Probation

The maximum term of probation is the maximum term of imprisonment for the crime. If the maximum term of imprisonment is increased under § 939.62(1), the maximum term of probation is increased accordingly. State v. Wicks, 168 Wis.2d 703, 706-07, 484 N.W.2d 378 (Ct. App. 1992).

D. Correcting an Improper Repeater Sentence

Section 973.13 provides that if a sentence is wrongly enhanced under § 939.62, (as by a failure to prove repeater status) the excess portion of the sentence will be void and the sentence commuted without further proceedings. This may be done either by an appellate court or by the trial court in a postconviction proceeding. Theriault, 187 Wis.2d at 133; Zimmerman, 185 Wis.2d at 559; State v. Holloway, 202 Wis.2d 694, 551 N.W.2d 841 (Ct. App. 1996).

If a trial court in a postconviction proceeding determines that the defendant's prior convictions were not properly proved, the court may correct the sentence by removing the excess portion and may also amend other portions of the sentence. Holloway, 202 Wis.2d at 698. Therefore, if a sentencing court is forced to correct the sentence under § 973.13, it may resentence the defendant "if the premise and goals of the prior sentence have been frustrated" by the need to commute the sentence. Id. at 700. In Holloway, the trial court reduced a sentence due to a failure to prove the defendant's prior convictions, but then altered the sentences from concurrent to consecutive. The court of appeals affirmed that the sentencing court acted lawfully.

V. Application to Specific Crimes

A. Attempt — § 939.32

The penalty for an attempt (of other than a Class A felony) is half the penalty allowed for the completed crime. § 939.32(1). Because § 939.62 is considered a penalty enhancer and not a crime in itself, it is not subject to the halving provisions of the attempt statute, § 939.32(1). Therefore, if a defendant who qualifies as a repeat offender is convicted of an attempt, the "maximum penalty for the underlying crime is halved and then that penalty may be enhanced under § 939.62." State v. Bush, 185 Wis.2d 716, 725-26, 519 N.W.2d 645 (Ct. App. 1994).

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B. Controlled Substance Offenses — § 961.48

Section 961.48 provides for enhanced penalties for second or subsequent offenses under Chapter 961. It fulfills the same legislative purpose as does § 939.62. State v. Ray, 166 Wis.2d 855, 872, 481 N.W.2d 288 (Ct. App. 1992). Therefore, if a defendant is eligible for penalty enhancement under both § 961.48 and § 939.62, the sentence may be enhanced under either section but not under both. Id. at 873.

C. Contempt of Court — Punitive Sanction — § 785.04

Contempt of court for which a punitive sanction is imposed under § 785.04 is not a crime, and therefore, is not subject to the penalty-enhancing provisions of § 939.62. State v. Carpenter, 179 Wis.2d 838, 842-43, 508 N.W.2d 69 (Ct. App. 1993) applying McGee v. Racine County Circuit Court, 150 Wis.2d 178, 441 N.W.2d 308 (Ct. App. 1989).

D. Possession of a Firearm by a Felon — § 941.29

Section 941.29 states that "any person previously convicted of a felony who possesses a firearm is guilty of a Class E felony." This statute does not create a "penalty enhancer" but rather creates a distinct crime. State v. Jones, 142 Wis.2d 570, 576, 419 N.W.2d 263 (Ct. App. 1987). Therefore, the two-year maximum penalty applicable to violations of § 941.29 may be enhanced under § 939.62. Id.

E. Use of a Dangerous Weapon — § 939.63

Section 939.63 states that the maximum term of imprisonment for a crime may be increased if "a person commits a crime while possessing, using or threatening to use a dangerous weapon." Sections 939.62 and 939.63 may both be used to enhance the maximum term of imprisonment for a single crime. State v. Pernell, 165 Wis.2d 651, 658, 478 N.W.2d 297 (Ct. App. 1991). If the sentencing court wishes to use both § 939.62 and § 939.63 to increase the maximum term of imprisonment for a single crime, § 939.63 must be applied first. The amount of enhancement available under § 939.62 should then be determined (based on the maximum term of imprisonment for the underlying crime plus the amount already enhanced under § 939.63). Id. at 658-59.

COMMENT

SM-35 was approved by the Committee in February 1998.

1. The text of subs. (1), (2), and (3) of § 939.62 follow. As to sub. (2m), see note 2, below.

(1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s.

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946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) A maximum term of one year or less may be increased to not more than 3 years.

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

(c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.

(2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

[NOTE: Sub. (2m) is not included.]

(3) In this section "felony" and "misdemeanor" have the following meanings:

(a) In case of crimes committed in this state, the terms do not include motor vehicle offenses under chs. 341 to 349 and offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938, but otherwise have the meanings designated in s. 939.60.

(b) In case of crimes committed in other jurisdictions, the terms do not include those crimes which are equivalent to motor vehicle offenses under chs. 341 to 349 or to offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938. Otherwise, felony means a crime which under the laws of that jurisdiction carries a prescribed maximum penalty of imprisonment in a prison or penitentiary for one year or more. Misdemeanor means a crime which does not carry a prescribed maximum penalty sufficient to constitute it a felony and includes crimes punishable only by a fine.

2. Section 939.62(2m) contains what is commonly referred to as the "three strikes" provision. The formal title is "persistent repeater."

3. Repeater statutes are proliferating. The following provide increased penalties for repeated commission of specific crimes and are not addressed in this Special Material.

- § 939.621 Increased Penalty for Certain Domestic Abuse Offenses: provides a penalty increase of up to 2 years for domestic abuse offenses committed within 72 hours of arrest for a domestic abuse offense.

- § 939.626 Increased Penalty; Repeat Child Sex Crimes: provides a 10 year penalty increase for a second violation of § § 948.02, 948.05, 948.06, 948.07, or 948.08.

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Several other statutes refer to an "increased penalty" in their titles, but in fact provide for a minimum sentence, not an increase of the maximum. See, for example, § 939.623 Increased Penalty; Repeat Serious Sex Crimes [five-year minimum sentence]; § 939.624 Increased Penalty; Repeat Serious Violent Crimes [five-year minimum sentence]; § 939.635 Penalties; Assault Or Battery In Secured Juvenile Correctional Facility [five-year minimum sentence].

Finally, there is a series of statutes providing for a penalty increase where a crime is committed under certain circumstances: while armed with a dangerous weapon; while identity is concealed; etc. These have the effect of creating an additional element of the crime and most are addressed by jury instructions presenting the additional fact as a special question for the jury:

- § 939.625 Gang Crime Penalty Enhancer: provides a penalty increase of 5 years for gang-related criminal activity [see Wis JI-Criminal 985].

- § 939.63 Penalties; Use Of A Dangerous Weapon: provides for penalty increases if a person commits a crime while possessing or using a dangerous weapon [see Wis JI-Criminal 990].

- § 939.632 Penalties; Violent Crime in a School Zone: provides a 5-year penalty increase for certain "violent crimes" that are felonies and a 6-month penalty increase for certain "violent crimes" that are misdemeanors (changing their status from a misdemeanor to a felony). There is no jury instruction.

- § 939.64 Penalties; Use of Bulletproof Garment: provides a 5-year penalty increase for felonies committed while wearing a bulletproof garment [see Wis JI-Criminal 993].

- § 939.641 Penalties; Concealing Identity: provides a 5-year penalty increase for felonies committed while identity is concealed; increases the maximum sentence to one year in jail for misdemeanors [see Wis JI-Criminal 994].

- § 939.645 Penalties; Crimes Committed Against Certain People or Property: this is the so-called Hate Crimes Law; it provides a 5-year penalty increase for felonies and increases the maximum sentence to one year in jail for misdemeanors [see Wis JI-Criminal 996, 996.1].

- § 939.648 Penalty; Terrorism: provides a 10-year penalty increase for crimes involving "terrorism." There is no jury instruction.

- § 939.646 Penalty; Crimes Committed Using Information Obtained From The Sex Offender Registry: provides for a 6-month increase on misdemeanors and a 5-year increase for felonies if the crime was committed using information obtained from the sex offender registry under § 301.46. There is no jury instruction.

- § 939.648 Penalty; Terrorism: provides a 10-year penalty increase for crimes involving "terrorism."

Also note that Chapter 961 has its own repeater provision for controlled substance offenses [see § 961.48]. See the discussion at sec. V., B., this Special Material.

4. For discussion of misdemeanor expunction under § 973.015, see SM-36, Misdemeanors; Special Disposition Under Section 973.015.

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SM-36 SPECIAL DISPOSITION UNDER SECTION 973.015 — EXPUNCTION[1]

The following is suggested as a framework for deciding whether or not a defendant should receive alternative disposition under § 973.015(1m)(a)1.[2]

AT THE TIME OF SENTENCING,[3] THE COURT SHALL, IF REQUESTED BY THE DEFENDANT OR DEFENDANT'S COUNSEL, AND MAY, ON THE COURT'S OWN MOTION, DETERMINE WHETHER THE DEFENDANT SHOULD BE AFFORDED SPECIAL DISPOSITION UNDER § 973.015.

I. An Offender is Eligible for § 973.015(1m)(a)1. Disposition if:

A. The offender was under the age of 25 at the time the offense was committed;

B. The offense is

1. a misdemeanor

2. a Class H felony and

a. the person has not been convicted of a prior felony, and
b. the felony is not a violent offense as defined in s. 301.048(2)(bm), and
c. the felony is not a violation of s. 940.32, s. 948.03(2), (3), or (5)(a)1., 2., 3., or 4., or of s. 948.095.

3. a Class I felony and

a. the person has not been convicted of a prior felony, and
b. the felony is not a violent offense as defined in s. 301.048(2)(bm), and
c. the felony is not a violation of s. 948.23(1)(a)

C. The court determines that the offender will benefit and society will not be harmed by the disposition.[4]

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II. Ordering Special Disposition under § 973.015(1m)(a)1.

If the sentencing judge determines that special disposition under § 973.015(1m)(a)1. is appropriate, the judge should state the finding on the record as follows:

"The court finds that the defendant has been convicted of an offense for which the maximum penalty is imprisonment for six years or less and that the defendant was under age 25 at the time the offense was committed. The court also finds that the defendant will benefit and that society will not be harmed by special disposition under § 973.015(1m)(a)1."

"THEREFORE IT IS ORDERED, pursuant to § 973.015(1m)(a)1., that upon successful completion[5] of the sentence imposed, as evidenced by receipt by this court (of payment of the fine and costs) (of a certificate of discharge from the (detaining) (probationary) (authority)), the clerk of court shall expunge[6] the record without further order of this court."

III. Rejecting Special Disposition under § 973.015(1m)(a)1.

If the defendant has requested special disposition under § 973.015(1m)(a)1. and the judge determines that the disposition is not appropriate, the judge should make a specific statement on the record that the disposition was considered and state the reasons for rejecting it:

"Special disposition available under Wis. Stat. § 973.015(1m)(a)1. has been considered. The court has determined that such disposition is not appropriate

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because (the offender will not benefit because (specify) (and) (society will be harmed because (specify)).

COMMENT

SM-36 was originally published in 1979 and revised in 1991, 1995, 1998, 2010, and 2013. This revision was approved by the Committee in April 2018; it involved editorial changes to the text, updating statutory references, and adding case law references to the Comment.

Section 973.015 was created by Chapter 39, § 711m, Laws of 1975, as a companion to the Youthful Offenders Act, Chapter 54, Wis. Stat., which has been repealed (Chapter 418, Laws of 1977).

This Special Material outlines the standards for discretionary expunction under § 973.015(1m)(a)1. Expunction is required under § 973.015(1m)(a)2. "if the offense was a violation of § 942.08 (2)(b), (c), or (d) or (3) and the person was under the age of 18 when he or she committed it." Section 942.08 defines the offense of "invasion of privacy." Subsection (1m)(a)2. was created by 2003 Wisconsin Act 50 [effective date: September 5, 2003]. A third expunction option is provided by sub. (2m), created by 2013 Wisconsin Act 362 [effective date: April 25, 2014]. It applies to victims of trafficking who were convicted of violating § 944.30, Prostitution.

2009 Wisconsin Act 28 expanded the scope of § 973.015. The statute originally allowed expunction of misdemeanor convictions committed by persons under the age of 21. Act 28 amended the statute to change the age limit to "under the age of 25" and to extend applicability to all offenses for which the maximum penalty is 6 years or less (with some exceptions). The changes first apply to sentencing orders that occur on the effective date of Act 28 – July 1, 2009. (Sections 9309 and 9400, Act 28.)

Thus, the expunction authorized by § 973.015(1m)(a)1. now applies to all Class H and I felonies committed by persons under age 25, subject to exceptions set forth in new sub. (1)(c):

- it is not applicable to Class H felonies if

    - the defendant has a prior felony conviction, or
    - the crime is a "violent offense" under § 301.048(2)(bm)*, or
    - the crime is a violation of

        - § 940.32 [Stalking]
        - § 948.03(2), (3) or (5)(a)1., 2., 3., or 4. [Physical abuse of a child] or
        - § 948.095 [Sexual assault by school staff person]

- it is not applicable to Class I felonies if

    - the defendant has a prior felony conviction, or
    - the crime is a "violent offense" under § 301.048(2)(bm)*, or
    - the crime is a violation of § 948.23(1)(a) [Concealing the death of a child]

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* The reference to a "violent offense under § 301.048(2)(bm)" is to the intensive sanctions statute, which lists more than 50 crimes that are deemed violent offenses. Of the crimes listed, only a few are Class H or I felonies.

NOTE: The standard for the court to use to determine whether expunction should be ordered remains the same: the person must successfully complete the sentence; and the person will benefit from expunction and society will not be harmed.

1. "Expunction" is the proper noun form of the verb "expunge." However, the use of "expungement" is common and § 973.015 is often referred to as "the expungement statute." See, for example, State v. Leitner, 2001 WI App 172, ¶1, 247 Wis.2d 195, 633 N.W.2d 207. The Wisconsin Supreme Court has noted: "There are two different words for the noun form of 'expunge'; we use 'expunction,' but 'expungement' is also used. To be clear, 'expungement' and 'expunction' mean the same thing." State v. Arberry, 2018 WI 7, ¶1, footnote 2, 379 Wis.2d 254, 905 N.W.2d 811.

2. Section 973.015 does not create a new type of sentence as such, but provides for the possibility of record expunction after completion of a sentence. It comes into play after an offender has been convicted and sentenced under standard procedure.

Ordering expunction is within the discretion of the sentencing judge since the statute provides: ". . . the court may order at the time of sentencing. . . ." (Emphasis added.) The court should consider disposition under § 973.015 and make a record of its decision, whenever the defendant requests it. The court may also consider disposition under this section on its own motion but need not consider it in every case where there is no request by the defendant or counsel.

A court commissioner does not have the authority to order expunction. State v. Michaels, 142 Wis.2d 172, 417 N.W.2d 415 (Ct. App. 1987).

Expunction under § 973.015 does not extend to judgments in forfeiture actions. Kenosha County v. Frett, 2014 WI App 127, 359 Wis.2d 246, 858 N.W.2d 397. The attorney general has concluded "that circuit courts in the State of Wisconsin do not possess the inherent or implied powers, in the absence of authorizing or enabling statutes, to order the destruction or expunction of criminal conviction records." 70 Op. Att'y Gen. 115, 120 (1981).

3. In State v. Matasek, 2014 WI 27, 353 Wis.2d 601, 846 N.W.2d 811, the supreme court affirmed a decision of the court of appeals which held that a trial court's decision whether or not to order expunction under § 973.015 is to be made at the time of sentencing. Under that view, the statute does not allow the trial court to leave the issue open until the defendant successfully completes the sentence. The supreme court stated:

> We interpret the phrase "at the time of sentencing" in Wis. Stat. § 973.015 to mean that if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding. ¶6.
>
> In State v. Arberry, 2018 WI 7, ¶5, 379 Wis.2d 254, 905 N.W.2d 811, the court reaffirmed the conclusion in State v. Matasek: ". . . a defendant may not seek expunction after sentence is

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imposed because both the language of Wis. Stat. § 973.015 and Matasek require that the determination regarding expunction be made at the sentencing hearing." Further, a motion for modification of sentence does not create a second "time of sentencing"; the term refers only to the original imposition of sentence. ¶17.

4. See § 973.015(1m)(a)1. Except for stating the standard "the person will benefit and society will not be harmed," § 973.015 contains no guidelines for the judge to apply in deciding whether to order special disposition. Since the statute says only that the court "may order" special disposition at the time of sentencing, the Committee concluded that the decision lies entirely within the discretion of the sentencing judge, applying those standards that are generally applicable to the sentencing decision. Also see, State v. Helbricht, 2017 WI App 5, 373 Wis.2d 203, 891 N.W.2d 412.

5. "Successful completion" involves paying a fine, serving a jail sentence, or completing a period of probation and not being convicted of a subsequent offense (see § 973.015(1m)(b)).

In State v. Ozuna, 2017 WI 64, 376 Wis.2d 1, 898 N.W.2d 20, the defendant was issued a certificate discharging him from probation. The certificate had two boxes – both of which were checked – one indicating that probation was successfully completed and the other that he had not satisfied a "no alcohol" condition. He was denied previously-ordered expunction because he did not "successfully complete" probation. The supreme court concluded that expunction was properly denied – completing probation without revocation does not mean that all conditions were satisfied, and "successful completion" requires that those conditions be satisfied. The court noted that the form has been changed – it now has two boxes: "successfully completed" and "not successfully completed."

In State v. Hemp, 2014 WI 129, 359 Wis.2d 320, 856 N.W.2d 811, the supreme court reversed a decision of the court of appeals which held that Hemp's successful completion of his sentence did not automatically entitle him to expungement: while the controlling authority must issue the certificate of discharge, the court of appeals held that Hemp was responsible for doing the latter and he failed to do so in a timely manner. The supreme court reversed:

> ¶4 First, we hold that the successful completion of probation automatically entitled Hemp to expungement. Second, we hold Wis. Stat. § 973.015 is unambiguous and places no burden on Hemp to petition for expungement within a certain period of time because the duty to forward the certificate of discharge rests solely with the "detaining or probationary authority." Finally, we hold the circuit court improperly exercised its discretion when it reversed the decision it made at sentencing to find Hemp eligible for expungement.

6. Section 973.015 does not define "expunge." The word literally means "to destroy or obliterate; it implies not a legal act, but a physical annihilation." (Black's Law Dictionary, Revised 4th Edition.) On November 3, 1997, the Wisconsin Supreme Court issued Order No. 97-07, dealing with expunction of court records. The order created SCR 72.06 to read as follows:

> 72.06 Expunction
>
> When required by statute or court order to expunge a court record, the clerk of the court shall do all of the following:

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(1) Remove any paper index and nonfinancial court record and place them in the case file.
(2) Electronically remove any automated nonfinancial record, except the case number.
(3) Seal the entire case file.
(4) Destroy expunged court records in accordance with the provisions of this chapter.

While this order clarifies the procedure to be followed by the clerk of courts in dealing with a record ordered expunged, there is little authority in Wisconsin relating to the consequences of expunged convictions. In State v. Anderson, 160 Wis.2d 435, 466 N.W.2d 681 (Ct. App. 1991), the court held that a conviction ordered expunged under § 973.015 cannot be used to impeach the credibility of the convicted person. [Anderson also held that the statute required physical destruction of the court record, a conclusion apparently overruled by SCR 72.06.]

The Committee concluded that a conviction expunged under § 973.015 may not be used as a prior offense for purposes of the general repeater statute, § 939.62. Section 939.62(2) requires that prior convictions "remain of record and unreversed." In the Committee's judgment, an expunged conviction does not "remain of record." This conclusion was also reached by the Wisconsin Supreme Court in State v. Leitner, below.

The Wisconsin Supreme Court has held that "§ 973.015 does not direct district attorneys or law enforcement agencies to expunge their records documenting the facts underlying an expunged record of conviction. We further conclude that the circuit court may consider, when sentencing an offender, the facts underlying a record of conviction expunged under § 973.015." State v. Leitner, 2002 WI 77, ¶48, 253 Wis.2d 449, 646 N.W.2d 341. The court also recognized that "expunging the court record provides substantial advantages to the offender. An expunged record of a conviction cannot be considered at a subsequent sentencing; an expunged record of a conviction cannot be used for impeachment at trial under § 906.09(1); and an expunged record of a conviction is not available for repeater sentence enhancement." 2002 WI 77, ¶39. The Wisconsin Court of Appeals applied Leitner in State v. Allen, 2015 WI App 96, ¶38, 373 Wis.2d 98, 890 N.W.2d 245: ". . . a sentencing court must be permitted to consider all the facts underlying an expunged criminal conviction, and not just those underlying the crime itself."

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SM-39 BAIL AFTER CONVICTION; STAY OF EXECUTION OF SENTENCE

[WITHDRAWN]

COMMENT

SM-30A was originally published as SM-30A in 1985. It was renumbered SM-39 in 1987. It was withdrawn by the Committee in 1995.

Bail after conviction is addressed at CR-2-9, Wisconsin Judicial Benchbook, Volume I.

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SM-40 COURT'S INSTRUCTION TO DEFENDANT AT ARRAIGNMENT AND BEFORE ACCEPTANCE OF A PLEA OF GUILTY ON SEX CRIMES CHARGE

[WITHDRAWN]

COMMENT

SM-40 was originally published in 1974 and revised in 1978. It was withdrawn in 1991.

This Special Material provided advice to a defendant charged with certain sex crimes and subject to specialized treatment under provisions found in Wis. Stat. Ch. 975. The sex crimes program was repealed by Chapter 184, Laws of 1979. No person could be committed under Chapter 975 after July 1, 1980. § 975.01(1). Therefore, there is no use for this Special Material after that date.

The legislation repealing the sex crimes program also extended a sentencing option to those persons committed under the Sex Crimes Law. They may petition the committing court for the imposition of a criminal sentence to replace the Chapter 975 commitment. See SM-41, Resentencing Persons Committed Under The Sex Crimes Law.

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SM-41 SENTENCING PERSONS COMMITTED UNDER THE SEX CRIMES LAW

[WITHDRAWN]

COMMENT

SM-41 was published in 1987. It was withdrawn by the Committee in 2010.

This Special Material outlined the procedure under § 975.17, which allowed persons committed under Chapter 975, the Sex Crimes Law, to petition the court for imposition of a criminal sentence to replace the Chapter 975 commitment. Chapter 975 commitments were repealed by Chapter 117, Laws of 1979, effective July 1, 1980.

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SM-45 INQUIRY IN CONFLICT OF INTEREST CASES

This Special Material is intended to implement decisions of the Wisconsin Supreme Court requiring that the trial court make an inquiry when facts indicate a potential conflict of interest on the part of defense counsel. The obligation first applied to cases where codefendants were represented by the same lawyer, State v. Kaye, 106 Wis.2d 1, 14, 315 N.W.2d 337 (1982),[1] and was later expanded to all cases where a conflict of interest may arise, State v. Miller, 160 Wis.2d 646, 467 N.W.2d 118 (1991).[2]

Where an inquiry is required, it has two purposes: to elicit sufficient facts to determine whether an actual conflict or a serious potential conflict exists; and if a conflict exists, to determine whether the defendant may waive the right to conflict-free representation.

I. Cases in Which an Inquiry is Required

A. Multiple representation

State v. Kaye held that an inquiry is required: ". . . whenever the same attorney or law firm represents more than one defendant in the same criminal case." The rule was reaffirmed in State v. Miller, supra, and in State v. Dadas, 190 Wis.2d 340, 526 N.W.2d 818 (Ct. App. 1994).[3]

1. Federal Rule 44(c), after which the Kaye requirement was modeled, requires an inquiry when defendants are represented by attorneys "associated in the practice of law."

2. An inquiry should be made whether counsel is retained or appointed.[4]

3. Inquiry is required in both felonies and misdemeanors.

4. The inquiry is not limited to cases expected to go to trial[5] but is required to assure effective assistance of counsel in regard to all matters beyond the initial appearance and setting of pretrial release.

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B. Other conflict of interest situations

The primary cases reaching the appellate courts have involved multiple representation, but conflict of interest concerns can also arise where defense counsel has previously participated in the prosecution of the defendant[6] or represents or has represented a witness for the state.[7] In either situation, the trial court should conduct an inquiry into the existence of an actual conflict.[8]

II. Inquiry Whether a Conflict Exists

A. Standard

The court must first determine whether an actual or serious potential conflict exists.

Cases have elaborated upon the standard in multiple representation cases, concluding that there is an actual conflict of interest where incriminating information voluntarily supplied by one client is used to provide evidence of another client's criminal activities, expose another client to potential criminal prosecution, or provide justification for a sentencing recommendation or a sentence.[9] Counsel could face a conflict of interest in several different situations: in pursuing plea negotiations for one client; cross-examining one of the clients at trial; or pursuing a line of defense for one client that might implicate another.[10]

In conflict situations not involving multiple representation, similar concerns are involved, all relating to the central question: is counsel able to give undivided loyalty to the client.

B. Timing

Inquiry regarding the existence of an actual conflict of interest or of a serious potential conflict should be made at the arraignment in misdemeanors and as early as possible in felonies. In felonies, waiting until the arraignment is too late. The inquiry should be conducted:

1. In open court (generally, but see below).

2. On the record.

3. With the participation of the prosecutor.

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Evidence of possible conflict of interest could arise at any time during the case; if so, an inquiry should be conducted then.

C. In chambers inquiry

If the initial inquiry indicates a possibility of conflict of interest, a more detailed inquiry is required. If the detailed inquiry would result in disclosures to the prosecutor that would be unfairly prejudicial to the defendant, inquiry should be in chambers, on the record, with defendant and defense counsel. The prosecutor may be excluded. If a detailed inquiry would result in information coming to the trial judge's attention that would be unfairly prejudicial to the defendant, the inquiry may be conducted before a different judge.

III. Inquiry of Defense Counsel

Adequately investigating the conflict of interest issue may require making inquiry of defense counsel.

A. Standards relating to conflict of interest

The Wisconsin Rules of Professional Conduct for Attorneys address conflict of interest in two sections. See SCR 20:1.7, Conflict of interest: general rule, and SCR 20:1.8, Conflict of interest: prohibited transactions.

Specific duties of defense counsel are elaborated upon by Sec. 4-3.5(b) of the ABA Standards. This standard was adopted in State v. Kaye, 106 Wis.2d 1, 15:[11]

> (b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear that:
>
> (i) no conflict is likely to develop;
>
> (ii) the several defendants give an informed consent to such multiple representation; and

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(iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients. In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct.

B. Questions to ask defense counsel

1. Has counsel considered the possibility of conflict?

2. What investigation has counsel undertaken to see whether conflict exists?

3. What discussion or explanation of conflict has there been with the client?

C. The court should strongly advise against multiple representation

IV. Inquiry of Defendants

If a conflict is found to exist, it may be waived by the defendant after a proper inquiry is made by the court. This requires addressing the defendant personally, in the same manner as a guilty plea.

An inquiry like the following is suggested:

COURT: "Your right to a fair trial guarantees that you have the right to be represented by counsel. In the circumstances of this case, one part of that right to counsel may be in conflict with another part of that right.

"You do have the right to counsel of your own choice. That is, you have the right to select your own lawyer and to be represented by that lawyer. At the same time, you have the right to be represented by a lawyer who has undivided loyalty to you; that is, your lawyer should have only your interests at heart with no conflicting reason for not representing your interests as vigorously as possible.

[THE FOLLOWING TWO PARAGRAPHS APPLY ONLY TO THE MULTIPLE REPRESENTATION CASE.][12]

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"It is the right to counsel with no conflict of interest that is at stake here. Because your lawyer is undertaking to represent both you and your codefendant, there is the potential for a conflict of interest. A lawyer seeking to represent two defendants in the same case unavoidably faces the possibility that the duty to one client may conflict with the duty to the other. A conflict can arise in many different situations: plea negotiations; deciding what witnesses to call and how to question them; deciding whether either defendant should testify; making opening and closing arguments in court; and in other situations. And if both you and your codefendant are convicted, it will be especially difficult for the lawyer to represent both of you effectively at sentencing without arguing that one of you deserves more blame than the other.

"Conflict of interest arises in many different ways and is difficult to detect or foresee. As a result, the law strongly prefers that a lawyer represent only one person. However, the law also recognizes that a person accused of crime has the right to be represented by the lawyer of his choice and therefore allows you to give up the right to counsel who represents only you.

"You should discuss these problems with your lawyer, and you should feel free to discuss them with another lawyer if you want to. If, after carefully considering possible problems which may arise, you wish to continue to be represented by your present lawyer, the court will consider your request. The court will be in recess until you have had a full opportunity to consider this with your lawyer and decide this important matter."

AFTER ALLOWING A REASONABLE PERIOD OF TIME FOR THE DEFENDANT(S) TO CONSIDER THE CONFLICT OF INTEREST PROBLEM, MAKE THE FOLLOWING INQUIRY ON THE RECORD.

"Do you wish to continue with your present lawyer?"

[IF THE ANSWER IS "NO," NO FURTHER INQUIRY IS NECESSARY.]

"Have you had enough time to consider the possible conflict of interest problem?"

"Have you discussed possible conflicts in your case with your lawyer?"

"Do you have any questions about the conflict of interest problem?"

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"Please explain what the term "conflict of interest" means to you."

[CONTINUE ASKING ABOUT THE DEFENDANT'S PERCEPTION OF THE CONFLICTS PROBLEM UNTIL SATISFIED THAT THE DEFENDANT IS AWARE OF AND UNDERSTANDS THE VARIOUS RISKS INVOLVED.]

"In spite of these possible problems, do you wish to continue to be represented by (name of lawyer) ?"

V. Waiver of the Right to Separate Counsel

A. The waiver must be free, voluntary, and understanding

1. It is like a guilty plea or a waiver of jury trial.

2. Inquiry into educational background, etc., may be necessary.[13]

B. If there is a valid waiver, the defendant may continue with joint representation subject to review by the court. See section VI, below.

VI. Rejecting the Waiver; Disqualifying Counsel

A trial court has the authority to disqualify counsel, even over the defendant's objection and proffered waiver of the right to conflict-free representation, when an actual or serious potential conflict of interest exists.[14]

The court must first have determined that an actual or serious potential conflict exists after conducting the inquiry outlined above. The court should be alert to any possibility that the state is seeking to manufacture the conflict to eliminate a particular lawyer as an adversary. When there is any evidence of this, it should be carefully explored in the record.[15]

Once an actual or serious potential conflict is established, the decision to disqualify counsel resides in the sound discretion of the trial court. Factors to consider include:[16]

(1) whether client and counsel have a close relationship or one of long duration;

(2) whether counsel has performed substantial work in the case;

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(3) whether an alternative lawyer of like ability could be obtained; and,

(4) whether disqualification would cause unacceptable delay.

COMMENT

SM-45 was originally published in 1982 and revised in 1989, 1991, and 1995. This revision, which involved a general updating and expanded SM-45 to apply to conflict of interest generally, was approved by the Committee in August 1999.

1. In State v. Kaye, the Wisconsin Supreme Court held:

> . . . we will require trial courts to conduct an inquiry whenever the same attorney or law firm represents more than one defendant in the same criminal case. The court should inquire of the defendants and their attorney at the arraignment as to the possibility for actual conflicts of interest. The judge should ensure that the defendants understand the potential conflicts and determine whether they want separate counsel. If the defendants insist on being represented by the same counsel, after being fully advised of the potential problems, the trial judge should permit such multiple representation. However, this determination should not be made unless it is clear the defendants have made a voluntary and knowing waiver of their right to separate counsel.

106 Wis.2d 1, 14.

Kaye arose in connection with a defendant's postconviction claim that he was denied effective assistance of counsel at sentencing because his lawyer also represented a codefendant. Though Kaye had not objected to the multiple representation in the trial court, he argued at the postconviction stage that his lawyer was precluded from arguing that Kaye was less culpable than the codefendant because the lawyer also represented the codefendant. The Wisconsin Supreme Court denied relief on the ground that Kaye failed to show "that an actual conflict of interest adversely affected his lawyer's performance," citing Cuyler v. Sullivan, 446 U.S. 335, 348 (1980), in which the United States Supreme Court established the standard for evaluating claims of ineffectiveness of counsel based on conflict of interest. However, the court in Kaye established the requirement for an inquiry by the trial court in order to avoid having problems like this arise in the future.

[Note that a different standard applies to evaluating claims of ineffective assistance of counsel in multiple representation cases. The test is whether "an actual conflict of interest adversely affected performance." This is in contrast to the test in all other situations, which involves two questions: (1) was performance of counsel deficient; and (2) if so, was there prejudice. Strickland v. Washington, 466 U.S. 668 (1984). In the multiple representation situation, prejudice is presumed "if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3120 (1987), citing Strickland, supra, 466 U.S. at 692, and Cuyler, supra, 446 U.S. at 348, 350.]

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The rule announced in Kaye is modelled after Rule 44(c) of the Federal Rules of Criminal Procedure. Rule 44(c) provides:

> (c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

The commentary to the federal rule offers a helpful discussion of the scope and nature of the multiple representation problem.

2. In Miller, the court reaffirmed the rule in State v. Kaye, supra, as to multiple representation cases, but stated the obligation to conduct an inquiry more broadly: ". . . a circuit court should make an inquiry . . . when counsel represents codefendants in the same criminal case or when a question of conflict of interest is raised in any criminal case about an accused's counsel of choice." 160 Wis.2d 646, 660-61.

3. In State v. Dadas, 190 Wis.2d 340, 526 N.W.2d 818 (Ct. App. 1994), the court of appeals reaffirmed the need for a trial court to conduct a colloquy with the defendant(s) in all cases where one lawyer represents more than one defendant. Noting that State v. Kaye, supra, did not identify the remedy to be applied where a required colloquy is not conducted, the court of appeals decided it should "independently review the record to ascertain from the facts and circumstances if there was an actual conflict of interest." 190 Wis.2d 340, 346.

4. Multiple representation concerns should rarely come up in cases involving appointed counsel, since the State Public Defender is under a statutory obligation to enact rules relating to conflict of interest. See § 977.02(6).

5. See, for example, § 968.45(1), relating to witnesses before a grand jury, which reads in part as follows:

> . . . . If the prosecuting officer, attorney for a witness or a grand juror believes that a conflict of interest exists for an attorney or attorneys to represent more than one witness before a grand jury, the person so believing may make a motion before the presiding judge to disqualify the attorney from representing more than one witness before the grand jury. A hearing shall be held upon notice with the burden upon the moving party to establish the conflict.

6. State v. Love, 227 Wis.2d 60, 594 N.W.2d 806 (1999), reversing 218 Wis.2d 1, 579 N.W.2d 277 (Ct. App. 1998): defense counsel was a former prosecutor who had represented the state at Love's original sentencing two years earlier. The court of appeals held that the appearance of a conflict was so strong that nothing more is required to warrant a remand for resentencing with different counsel. The supreme court reversed, holding that an inquiry into the presence of an actual conflict of interest is required in the serial representation case. Also see State v. Cobbs, 221 Wis.2d 101, 548 N.W.2d 709 (Ct. App.

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1998): defense counsel had previously worked as a prosecutor in a case involving the defendant five years earlier; there was no actual conflict or a serious potential conflict of interest.

7. State v. Street, 202 Wis.2d 534, 551 N.W.2d 830 (Ct. App. 1996): defense counsel had an actual conflict of interest because counsel was also representing a detective — who was the lead investigator in the criminal prosecution of Street — in the detective's divorce.

8. In State v. Love, note 6, supra, the Wisconsin Supreme Court held that the same inquiry should be conducted in the serial representation case that Kaye requires for the multiple representation case. The court emphasized that the key to addressing these potential problems is early disclosure to the trial court:

> In extending Cuyler-Kaye standards to serial representation, we are bound to extend also the requirement that all potential conflicts of interest that result from an attorney switching sides be made known to the court as soon as feasible before trial so that the court can inform the affected parties and conduct an appropriate inquiry.

227 Wis.2d 60, 79.

9. State v. Dadas, 190 Wis.2d 340, 347-48, 526 N.W.2d 818 (Ct. App. 1994).

10. These were examples recognized in State v. Miller, supra, 160 Wis.2d 646, 659.

11. The ABA standard cited in the text and adopted in Kaye recognizes that an attorney who undertakes multiple representation may be engaging in unprofessional conduct. For a case where multiple representation was the basis for discipline of an attorney, see Disciplinary Proceedings Against Eisenberg, 117 Wis.2d 332, 344 N.W.2d 169 (1984).

12. The two paragraphs that follow in the text are intended to describe the conflict of interest that exists where one lawyer represents more than one defendant. In other conflict cases, a similar description of the nature of the conflict should be provided.

13. SM-30, **WAIVER OF COUNSEL**, suggests general questions that relate to the defendant's ability to make an understanding and voluntary waiver of counsel. The same questions may be useful in connection with the waiver of conflict-free counsel. Also see SM-32, **ACCEPTING A PLEA OF GUILTY**, for similar questions about educational background, drug use, etc.

14. In Wheat v. United States, 486 U.S. 153 (1988), the United States Supreme Court dealt with the question whether a federal district court could decline a defendant's waiver of the right to conflict-free representation. Wheat was charged with crimes relating to a drug distribution enterprise. He sought to substitute for his lawyer by bringing in a different lawyer who also represented two others charged with crimes related to the same drug enterprise. The trial judge refused to allow the substitution, finding that there was an irreconcilable conflict of interest that could not be waived, despite the defendant's willingness to do so. Wheat appealed on the ground that the refusal to accept his waiver deprived him of his right to be represented by counsel of his choice. The Supreme Court upheld the action of the trial court, holding that "where a court finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented." This applies to cases involving potential as well as actual conflicts. The trial court "must recognize a presumption in favor of petitioner's counsel

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of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court."

In State v. Miller, 160 Wis.2d 646, 467 N.W.2d 118 (1991), the Wisconsin Supreme Court adopted the Wheat rule:

> We conclude that the circuit court may, in its discretion, disqualify counsel of a criminal accused, even over the accused's objection and proffered waiver of the right to conflict-free representation, when an actual or a serious potential for conflict of interest exists.

160 Wis.2d 646, 650.

The court overruled any language in State v. Kaye, supra, that could be interpreted as prohibiting a circuit court from exercising this authority.

15. In State v. Miller, supra, the court repeated the caution set forth in Wheat that trial courts be alert to the possibility that the government may seek to create a conflict of interest to eliminate a defense lawyer who may be a formidable adversary. The Wisconsin Supreme Court "repeat[ed] these admonitions so that circuit courts will be sensitive to the motives of the prosecutors and carefully explore this issue on the record in the exercise of its discretion to disqualify counsel." 160 Wis.2d 646, 654.

16. These factors were acknowledged in State v. Miller, supra, 160 Wis.2d 646, 659.

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SM-50 COMPETENCY TO PROCEED

The following Special Material outlines the procedures relating to a criminal defendant's competency to proceed as those procedures are set forth in sections 971.13 and 971.14, Wisconsin Statutes. The material takes into account the changes in those statutes made by legislation through the end of the 1995-96 legislative session.

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SM-50 COMPETENCY TO PROCEED

I. The Legal Standard for Incompetency

Section 971.13(1) provides: "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." (Emphasis added.)

A. "Lacks substantial mental capacity"

The phrase "lacks substantial mental capacity" replaced the former statute's "as a result of mental disease or defect is unable. . ." Thus, there is no need to identify a particular mental disease as the source of the alleged difficulty. The co-reporters for the Judicial Council committee that drafted the current competency statutes state:

> Not every defendant with a clinically recognized mental disorder is incompetent to stand trial. The legal standard is whether the defendant has the present mental capacity to understand the proceedings and assist in his or her own defense. The new legislation does not change this standard. It does clarify, however, that a defendant should not be considered incompetent to proceed merely because he or she requires medication to maintain legal competency.

Fosdal and Fullin, "Wisconsin's New Competency to Stand Trial Statute," Wisconsin Bar Bulletin (Oct. 1982) p. 11.

The term "lacks substantial mental capacity" can include mental retardation as the basis for an incompetency finding. In State v. Garfoot, 207 Wis.2d 215, 227-28, 558 N.W.2d 626 (1997), the Wisconsin Supreme Court made the following comments in connection with a suggestion noted in the state's argument that mental retardation alone may not warrant a finding that the defendant is not competent to stand trial:

> The State is correct in that mental retardation in and of itself is generally insufficient to give rise to a finding of incompetence to stand trial. However a defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas.

B. "To understand the proceedings or to assist in his or her own defense"

This part of the standard has been part of Wisconsin law since 1965. The constitutional standard was stated as follows in Dusky v. United States, 362 U.S. 402 (per curiam, 1960): ". . . the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as a factual understanding of the proceedings against him." The Wisconsin Supreme Court has held that § 971.13(1) codifies the Dusky standard. State v. Garfoot, supra, 207 Wis.2d 215, 226.[1]

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The same standard for competency applies at any stage of the proceedings. A higher or more demanding standard is not required for the decision to withdraw a plea of not guilty by reason of mental disease or defect. State v. Byrge, 225 Wis.2d 702, 712, 594 N.W.2d 388 (Ct. App. 1999).

C. Rationale for the competency rule

The rule against trying a person who is not competent is grounded in due process: it violates fundamental fairness to prosecute a defendant who is not able to fully exercise his or her constitutional procedural rights. Further, "a defendant's full assistance and cooperation has been traditionally thought essential to developing the 'true facts' of the case." State ex rel. Matalik v. Schubert, 57 Wis.2d 315, 322, 204 N.W.2d 13 (1973).

D. Competency and related issues

It is often the defendant's courtroom behavior, inability to understand procedures, or difficulty in getting along with counsel that first gives reason to doubt competency to proceed. These problems may indicate other issues as well. These related issues are discussed briefly below.

1. Competency and criminal responsibility

Competency to stand trial is concerned with the defendant's mental condition at the time of the trial. Only the mental conditions that affect the ability to understand the proceedings and assist in the defense are at issue.

Criminal responsibility (or the "insanity defense") differs in two important respects. First, it is concerned with the defendant's mental condition at the time of the offense. Second, it is concerned with the effect of that mental condition on the defendant's ability to tell right from wrong or to conform his conduct to what the law requires.

A person with serious mental problems may present both competency to proceed and insanity defense issues, only one of them, or neither one. Trial courts should be alert for indications that either issue needs to be pursued and keep in mind the different time frames and abilities that each issue involves.

Courts sometimes order that competency and criminal responsibility evaluations be conducted at the same time or order an inpatient criminal responsibility examination. There is no statutory authority for an inpatient examination of a defendant's criminal responsibility. Trying to combine that examination with a competency evaluation causes problems for the examiners because there usually is not enough time to conduct both of them.

2. Competency and self-representation

This Special Material is concerned with competency to proceed in cases where the defendant is represented by counsel.[2] Occasionally, the competency of defendants who seek to represent themselves is questioned. Competency to stand trial is not the same as competency to proceed pro se. Pickens v. State, 96 Wis.2d 549, 567, 292 N.W.2d 601 (1980). In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the Wisconsin

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Supreme Court reaffirmed the Pickens rule and reversed a decision of the court of appeals that had held that separate inquiry into "competence for self-representation" was no longer required.

Extensive discussion of waiver of counsel, self-representation, and related issues is beyond the scope of this Special Material. But because these issues often arise in conjunction with competency to stand trial questions, a few considerations relating to the competency inquiry should be emphasized.

First, whether or not the defendant is represented by counsel, the court must determine if there is "reason to doubt" the defendant's competency to proceed. If there is "reason to doubt," the examination procedures set forth in subsecs. (1)-(3) of § 971.14 and outlined in this Special Material should be followed. If the court determines that the defendant is not competent to proceed, a commitment under § 971.14(5) should follow.

Second, if the defendant is found to be competent to proceed, and wishes to proceed pro se, the court must determine if the defendant is making a knowing and voluntary waiver of the right to counsel. If the waiver is valid, a further inquiry must be made to determine whether the defendant "possesses the minimal competency necessary to conduct his own defense." Pickens, 96 Wis.2d 549 at 569, reaffirmed in Klessig, 211 Wis.2d 194, 212. For a complete discussion, see SM-30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL.

3. Competency and amnesia

Amnesia by itself does not mean that a defendant is not competent to stand trial. Questions relating to amnesia may be raised by a request for a competency evaluation and, as to the competency issue, the regular standard applies. A defendant may suffer from amnesia and be competent under this standard. In those cases, Wisconsin courts have adopted a six-part test to determine whether the defendant — competent but claiming amnesia — can receive a fair trial. See State v. McIntosh, 137 Wis.2d 339, 404 N.W.2d 557 (Ct. App. 1987), and State v. King, 187 Wis.2d 548, 523 N.W.2d 159 (Ct. App. 1994).

II. When and How Is Competency Raised?

A. May be raised at any time

1. In the trial court

Competency may be raised at any time between the filing of charges and the pronouncement of judgment. While questions about competency are usually raised before trial, it can become an issue after trial but before sentencing. State v. McKnight, 65 Wis.2d 582, 223 N.W.2d 550 (1974).

2. During postconviction proceedings

In State v. Debra A.E., 188 Wis.2d 111, 523 N.W.2d 727 (1994), the Wisconsin Supreme Court addressed the standards and procedures to be used when competency is raised during

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postconviction proceedings. First, the court noted that the procedures set forth in §§ 971.13 and 971.14 govern competency determinations only through the sentencing stage of a criminal trial and that they do not require circuit courts to rule on competency during postconviction relief proceedings. 188 Wis.2d 111, 128, n.14. However, when the question of competency is raised in the circuit court at the postconviction stage, the court has the power to consider the question and should use the same "reason to doubt standard" employed under § 971.14. The court may use its discretion to determine how the competency evaluation should be made; if a hearing is held, the court should be guided by § 971.14 to the extent feasible. The standard for the competency decision was described as follows: ". . . a defendant is incompetent to pursue postconviction relief . . . when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." 188 Wis.2d 111, 126.

If the court finds that a defendant is not competent at the postconviction stage, "the court's goal is to fashion a process through which circuit courts and counsel can manage the postconviction relief . . . while protecting defendants' fair opportunity for postconviction relief and promoting the effective administration of the judicial system. . . . [O]rdinarily this process need not include a court order for treatment to restore competency. Meaningful postconviction relief can be provided even though a defendant is incompetent." 188 Wis.2d 111, 129-30. The court identified the following alternatives for the court to apply as appropriate:

(1) continuation of postconviction relief proceedings — defense counsel should initiate or continue postconviction relief on a defendant's behalf when any issues rest on the record, do not necessitate the defendant's assistance or decisionmaking, and involve no risk to the defendant;

(2) continuances or enlargement of time limits for postconviction relief [if issues do necessitate the defendant's assistance or decision making];

(3) appointment of temporary guardians — upon defense counsel's request, to make the decisions the law requires the defendant to make; and

(4) permitting defendants who regain competency to raise issues at a later proceeding that could not have been raised earlier because of incompetency.

188 Wis.2d 111, 133-36.

3. During probation revocation proceedings

In State ex rel. Vanderbeke v. Endicott, 210 Wis.2d 503, 563 N.W.2d 883 (1997), the Wisconsin Supreme Court set forth the procedure to be employed when competency is raised during a probation revocation proceeding.

If an administrative law judge has reason to doubt the probationer's competency, the revocation proceeding is to be stayed until a competency determination can be made. An administrative law judge having reason to doubt a probationer's competency shall promptly forward a written request for a competency determination to the circuit court in the county

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in which the probationer was sentenced. The request shall be accompanied by a copy of the papers on file in the revocation proceeding and the administrative law judge's written statement explaining the grounds for finding reason to doubt the probationer's competency.

Upon receipt of the written request from an administrative law judge, the circuit court shall determine the probationer's competency. The procedures for determining competency to proceed at trial, set forth in § 971.14, shall be followed to the extent practicable.

B. "Reason to doubt" the defendant's competency

Section 971.14(1)(a) requires that a competency inquiry be made "whenever there is reason to doubt a defendant's competency to proceed." Defendants who may be incompetent cannot waive the right to have the court determine their capacity to stand trial. Pate v. Robinson, 383 U.S. 375, 384 (1966).

C. Who may raise the issue?

1. Defense counsel

Defense counsel usually raises the competency issue and may do so either by written motion or orally, on the record, in court. If defense counsel has reason to doubt the defendant's competency, counsel must bring the issue to the trial court's attention. Failure to do so constitutes ineffective assistance of counsel. State v. Johnson, 133 Wis.2d 207, 395 N.W.2d 176 (1986). In Johnson, defense counsel had letters from a psychiatrist and a psychologist expressing serious doubts about the defendant's competency but made the "strategic decision" to withhold the letters from the court. The defendant was convicted, but the conviction was reversed on the ground that counsel's failure to raise the competency issue constituted ineffective assistance of counsel as a matter of law. ". . . [W]here defense counsel has a reason to doubt the competency of his client to stand trial, he must raise the issue with the trial court. The failure to raise the issue of competency makes the counsel's representation fall below an objective standard of reasonableness. . . . We believe that considerations of strategy are inappropriate in mental competency situations. Thus, we hold that strategic considerations do not eliminate defense counsel's duty to request a competency hearing." 133 Wis.2d 207, 220-21.

In State v. Meeks, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, the Wisconsin Supreme Court held that a lawyer who formerly represented the defendant cannot testify about his or her perceptions of the former client's competency when competency is raised in a new prosecution. [See discussion at Sec. IV., A., below.] The court adopted what is characterized as the minority view on this issue and admitted that it creates a tension with the Johnson decision. The court did not overrule Johnson, pointing out that:

> The attorney is merely obligated to "raise the issue [of competency] with the trial court." Johnson, 133 Wis.2d at 220. There is no requirement that the attorney testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence. Id., ¶46.

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2. Defendant

Defendants may occasionally try to raise the competency issue themselves, even if defense counsel has not. In these situations, courts may wish to conduct an inquiry to establish whether the defendant's competency is the problem as opposed to difficulty in getting along with defense counsel or simply dissatisfaction with defense counsel.

3. Prosecutor

The prosecutor may also choose to raise the competency issue. In these cases, courts should be aware that in some instances criminal charges followed by a prosecutor's raising the defendant's competency to proceed have been used as a substitute for initiating civil commitment proceedings under Chapter 51.

4. Court — sua sponte

Even if competency is not raised by the parties, a court has a duty to make an inquiry into competency whenever the defendant's conduct gives rise to "reason to doubt." Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966).

D. Basis for "reason to doubt" competency

A statement by the defendant or defense counsel to the effect that the defendant cannot understand the proceedings may not be enough to trigger a full competency inquiry and is not sufficient if negated by the defendant's actions, such as preparing motions that show an understanding of the proceedings. State v. McKnight, 65 Wis.2d 582, 223 N.W.2d 550 (1974). The claim should be supported by facts, such as the defendant's demeanor, medical history, the presence of irrational behavior, any prior medical opinions on competency to stand trial, etc. While defense counsel's representations need not be accepted without question, the United States Supreme Court has recognized that doubt expressed by the one with the closest contact with the defendant "is unquestionably a factor which should be considered." Drope v. Missouri, 420 U.S. 162, 177 n.13 (1975). If competency is not raised in open court, the presentation of a written motion (often captioned "Motion To Notice Competency") is an effective method for calling the issue to the court's attention.

In some cases, the "reason to doubt" competency will be obvious. In more difficult cases, it may be necessary to conduct an evidentiary hearing to help the court decide whether the full competency inquiry should be ordered.

In State v. Weber, 146 Wis.2d 817, 433 N.W.2d 583 (Ct. App. 1988), the court reviewed the "reason to doubt" standard in light of four factors: a statement by the defendant's first lawyer that he had "some question" regarding competency; the defendant's demeanor in the courtroom, specifically his silence and responses to certain questions; a civil mental commitment several years earlier; and statements by the defendant's second lawyer at sentencing to the effect that the defendant was under psychiatric care. The court concluded that these factors did not, individually or in combination, establish a "reason to doubt" competency.

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E. Probable cause determination

When the court is satisfied that there is reason to doubt the defendant's competency, an examination of the defendant is to be ordered but only after a finding that it is probable that the defendant committed the offense charged.

1. Unnecessary, if after preliminary examination

If the question about competency arises after the preliminary examination, a further probable cause determination is not required. § 971.14(1)(b).

2. From the complaint, unless the defendant comes forward

If competency is raised before the preliminary examination in a felony case (or at any time before the verdict is returned in a misdemeanor), the court may not order a competency evaluation until satisfied that it is probable that the defendant committed the offense charged.

The probable cause finding may be based solely upon the criminal complaint, unless the defendant comes forward with allegations sufficient to justify a hearing. § 971.14(1)(c).

3. Hearing on probable cause

A hearing must be ordered "if the defendant submits an affidavit alleging with particularity that the averments of the complaint are materially false." § 971.14(1)(c). The hearing is limited to the issues and witnesses required for determining probable cause. The defendant may call and cross-examine witnesses. The rules of evidence do not apply. § 911.01(4)(c).

Section 971.14(1)(c) allows the receipt of testimony over the telephone at the probable cause hearing: "Upon a showing by the proponent of good cause under § 807.13(2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means."[3]

If the court finds that probable cause is not established, the charge shall be dismissed without prejudice, and the defendant shall be released (subject to being held in custody or continued on bail for not more than 72 hours pending the issuance of a new complaint — see § 971.31(6)).

If the court finds that probable cause exists, an examination is ordered.

III. The Competency Examination

A. Ordering the examination

1. Appointing examiners

"One or more" examiners are to be appointed; they need not be psychiatrists but must have "the specialized knowledge determined by the court to be appropriate." § 971.14(2)(a). This is a change from prior law which required that examiners be "physicians."

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2. Outpatient examinations preferred

A defendant released on bail may not be ordered to have an inpatient examination unless the defendant fails to cooperate in the examination or the examiner informs the court that inpatient observation is necessary to an adequate examination. § 971.14(2)(b).

If the defendant is not released on bail, outpatient examinations are required unless "an inpatient examination is determined by the court to be necessary." § 971.14(2)(a) and Fosdal and Fullin, "Wisconsin's New Competency to Stand Trial Statute," Wisconsin Bar Bulletin (Oct. 1982), note 17.

3. Inpatient examinations

If an inpatient examination is found to be necessary, the defendant may be committed to "a suitable mental health facility" for up to 15 days. § 971.14(2)(a) and (c). Orders sometimes call for an examination by a particular person. While the facilities often try to honor those orders, there is not statutory authority for requiring them to do so. The facility may request one 15-day extension if it can show good cause why the examination cannot be completed within the original period. § 971.14(2)(c). The commitment is to a facility.

In the past, it was routine to order that competency evaluations be conducted at the state mental health institutes at Mendota and Winnebago. However, in most cases, evaluations can be conducted more quickly and efficiently at a community location operated under a contract with the Department of Health and Family Services as part of the department's "local sites" project.

The authority of the department to determine where evaluations will take place was clarified by the creation of § 971.14(2)(am):

> Notwithstanding par. (a), if the court orders the defendant to be examined by the department or a department facility, the department shall determine where the examination will be conducted, who will conduct the examination and whether the examination will be conducted on an inpatient or outpatient basis. Any such outpatient examination shall be conducted in a jail or a locked unit of a facility. In any case under this paragraph in which the department determines that an inpatient examination is necessary, the 15-day period under par. (c) begins upon the arrival of the defendant at the inpatient facility. If an outpatient examination is begun by or through the department, and the department later determines that an inpatient examination is necessary, the sheriff shall transport the defendant to the inpatient facility designated by the department, unless the defendant has been released on bail.

The court must arrange for the transportation of in-custody defendants to the examining facility and back to the jail. § 971.14(2)(d).

Time spent at an inpatient facility for a competency examination is time for which sentence credit is due under § 973.155 if the defendant is eventually convicted and sentenced. § 971.14(2)(a).

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4. The commitment order

The commitment order should be executed completely and clearly. (Use of the officially adopted circuit court form is required. See CR-205, available on the state court website: http://www.wicourts.gov/) It should indicate the name of the defense counsel [4] and the prosecutor, since examiners often wish to consult with the lawyers in conducting the examination. The examiners also find it helpful if the commitment order is accompanied by documents that provide more information about the defendant and the offense. The criminal complaint should be attached to the certificate in all cases. When available, the following materials are also helpful:

- police reports
- record of previous convictions or arrests
- a presentence report from other recent cases
- any other clinical records the prosecutor may have.

This additional material is especially important for inpatient examinations, since they must be completed within 15 days.

5. Examiner's duties

The examiner shall personally observe and examine the defendant and shall have access to treatment records. § 971.14(2)(e). "Treatment records" are defined in § 51.30(1)(b).

6. Medication and treatment during the examination period

Section 971.14(2)(f) provides that a defendant may receive voluntary treatment during the examination period. This "clarifies that a defendant on examination status may receive voluntary treatment but, until committed under sub. (5), may not be involuntarily treated or medicated unless necessary for the safety of the defendant or others. See s. 51.61(1)(f), (g), (h) and (i)." Judicial Council Committee's Note, 1981. Also see State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 823 (1987), discussed at Sec. IV., G., this Special Material.

7. Examination by other experts

Section 971.14(2)(g) provides that the defendant may be examined at any time by other experts chosen by the defendant or by the prosecution. These experts must be allowed reasonable access to the defendant. The examinations are limited to competency purposes.

B. The examiner's report

The requirements for the report and its contents are specified in § 971.14(3).

1. Time limits for filing

Section 971.14(2)(c) establishes the following time limits:

a. Outpatient examinations: within 30 days of the ordering of the examination.

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b. Inpatient examinations: within 15 days of the ordering of the examination (unless an extension has been ordered. In that case, within 30 days).[5]

2. Contents

Section 971.14(3) requires that the report contain the following:

a. Description of the examination.

b. Identification of the persons interviewed, the specific records reviewed, and any tests administered.

c. The clinical findings of the examiner.

d. The examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense, including the facts and reasoning, in reasonable detail, upon which that opinion is based.

e. If the report indicates the defendant lacks competency, the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within 12 months (or the maximum sentence for the most serious offense with which the defendant is charged, whichever is less).

f. If sufficient information is available, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment. [Sub. (3)(dm).]

Section 971.14(3)(e) further requires that the report contain "the facts and reasoning, in reasonable detail" for the findings and opinions set forth in c. through f., above.

3. Filing and distribution

The report is to be filed with the court (§ 971.14(3)), and the "court shall cause copies of the report to be delivered forthwith to the district attorney and defense counsel, or the defendant personally if not represented by counsel." § 971.14(4)(a).

"Upon the request of the sheriff or jailer charged with care and control of the jail in which the defendant is being held . . . , the court shall cause a copy of the report to be delivered to the sheriff or jailer." § 971.14(4)(a), as amended by 2003 Wisconsin Act 122, effective date: February 21, 2004.

The report shall not be otherwise disclosed prior to the hearing on competency. § 971.14(4)(a).

IV. The Judicial Determination Regarding Competency

Competency to stand trial is a legal issue to be decided by the court. A finding is not to be made on the basis of rubber stamping the expert's report. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 264, 214 N.W.2d 575 (1974).

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A. Evidentiary hearing on competency

A full evidentiary hearing is not always required, since the statutes allow the district attorney, the defendant, and the defense counsel to "waive their respective opportunities to present other evidence on the issue." § 971.14(4)(b). InState v. Guck, 176 Wis.2d 845, 500 N.W.2d 910 (1993), the court held that § 971.14(4)(b) does not require a personal statement by a defendant waiving the evidentiary hearing. In Guck, defense counsel stated in the trial court that he had discussed the report and the right to a hearing with the defendant and that the defendant wished to waive the hearing. The court concluded that "the Legislature did not intend to require a personal statement by a criminal defendant waiving the opportunity to present evidence on the issue of competency under sec. 971.14(4)(b)." 176 Wis.2d 845, 855.

The decision in Guck makes it clear that the statute does not require a personal statement by the defendant. But the Committee continues to recommend as good practice that the court personally inquire of the defendant whether he or she concurs in the waiver. A simple question at this stage may help to forestall a later, more cumbersome, inquiry into effectiveness of defense counsel.

Section 971.14(4)(b) allows the receipt of testimony over the telephone at the competency hearing: "Upon a showing by the proponent of good cause under § 807.13(2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means."[6]

In State v. Meeks, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, the Wisconsin Supreme Court held that a lawyer who formerly represented the defendant cannot testify about his or her perceptions of the former client's competency when competency is raised in a new prosecution. Meeks was charged with felony murder and his competency to stand trial was raised shortly after initial appearance. The state introduced testimony of an attorney who had represented Meeks on charges in earlier cases, but did not represent him on the current charges. The attorney did not testify as to any specific communications with Meeks, but the implication of her testimony was that Meeks was competent to proceed during those earlier cases.

The court of appeals held that the testimony was appropriate because it did not divulge the contents of any specific conversations and therefore did not violate the attorney-client privilege. The Wisconsin Supreme Court reversed, holding that:

> . . . an attorney's opinions, perceptions, and impressions relating to a former client's mental competency fall with the definition of a confidential communication pursuant to Wis. Stat. § 905.03(2) and SCR 20:1.6. As a result, such communications may not be revealed without the consent of the client. 2003 WI 104, ¶2.

The court adopted what is characterized as the minority view on this issue and admitted that it creates a tension with the Johnson decision. The court did not overruleJohnson, pointing out that:

> The attorney is merely obligated to "raise the issue [of competency] with the trial court." Johnson, 133 Wis.2d at 220. There is no requirement that the attorney

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testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence. Id., ¶46.

In a final summary, the court restated its conclusion:

> In summary, we hold that the testimony of Scholle violated the attorney-client privilege. While the contents of confidential conversations with Meeks were not revealed in her testimony, Scholle's expressed opinions, perceptions, and impressions of Meeks' competency were premised upon and inextricably linked to confidential communications. Confidential communications must be interpreted to include both verbal and non-verbal communications in order to preserve inviolate the integrity of the attorney-client relationship. Id., ¶58.

B. The burden of persuasion

Section 971.14(4)(b) provides as follows with respect to the standard of proof and the allocation of the burden of persuasion on the competency/incompetency issue:

> . . . . At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent the defendant shall be found to be incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence which is clear and convincing that the defendant is incompetent.

The statute appears to comply with due process requirements for the competency determination and commitment for treatment.[7] However, a possible problem remains if the statute is read literally: if a defendant "claims to be competent," the burden is on the state to prove incompetence "by evidence which is clear and convincing"; if the state fails to meet its burden, the statute provides that "the defendant shall be found competent."

A problem may arise in at least two ways. One is that if the defendant "claims to be competent," the state may well claim the defendant is competent as well, leaving neither party with an interest in presenting the case for either competency or incompetency. A second variation would be presented if the state does attempt to prove incompetency but fails. In either situation, the possible problem is this: failure to prove incompetency by clear and convincing evidence (either because no one pursues that issue or because the standard of proof is not satisfied) does not necessarily mean that competency is established by the greater weight of the evidence.

If it is a basic due process requirement that a person not be tried unless competency is established by at least the greater weight of the evidence, an affirmative finding must be made in every case where there is "reason to doubt" competency. The statute's assertion that "the defendant shall be found competent" in the absence of proof (to a higher degree of certainty) that the defendant is incompetent is no substitute for a finding based on the evidence.

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As a practical matter, this should not be a serious problem but the Committee recommends the cautious approach of making a finding of competency, based on the record, whenever there is "reason to doubt" competency rather than relying on the automatic direction of the statute. In virtually every case, a record failing to show incompetence (by clear and convincing evidence) should support an affirmative finding that the defendant is competent (by the greater weight of the evidence). A recommended finding is included in Sec. C., below.

The approach recommended here is essentially the same as the one called for by the ABA Criminal Justice Mental Health Standards. They call for a finding by the greater weight of the evidence that the defendant is competent. The burden of persuasion is not assigned to either party. If that finding is not made, the court is to consider issues of treatment to effect competence. Involuntary commitment for treatment is to be ordered if the basis therefor is established by clear and convincing evidence. See ABA Criminal Justice Mental Health Standards 7-4.8(c) and 7-4.9(a) (1989).

C. If the court finds the defendant competent, the criminal proceeding shall be resumed.

1. The required finding

If the court finds the defendant competent to proceed, a specific finding should be made. A finding like the following is recommended:

> The court has considered the reports of the examiners, the conduct and demeanor of the defendant, and all the facts and circumstances relating to the defendant's understanding of these proceedings. The court is satisfied by the greater weight of the credible evidence that the defendant does not lack substantial capacity to understand the proceeding or assist in his own defense. The court finds that the defendant is competent to proceed.

2. Competency restored by medication

Section 971.14(5)(d) provides:

> If the defendant is receiving medication the court may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings.

This provision should be implemented only after consideration of the decisions of the United States Supreme Court in Riggins v. Nevada, 504 U.S. 127 (1992) and Sell v. United States, 539 U.S. 166 (2003).

In Riggins, the Court reversed a conviction because the state trial court failed to make sufficient findings to support the forced administration of antipsychotic drugs during trial. Riggins was charged with murder and robbery. He complained about hearing voices and having trouble sleeping. The drug Mellaril was prescribed, beginning at a level of 100 milligrams per day. It was eventually increased to 800 milligrams per day. Prior to trial,

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Riggins requested that the trial court order the administration of the drug suspended until after trial. The trial court refused, without an extensive statement of reasons.

The United States Supreme Court held that the involuntary administration of Mellaril denied Riggins "a full and fair trial." The side effects of the drugs could affect Riggins' outward appearance, which is observed by the jury in evaluating the defendant's demeanor. And ". . . it is clearly possible that such side effects impacted . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." 504 U.S. 127, 137. Further, a defendant has a liberty interest in freedom from unwanted antipsychotic drugs. The Court found the record insufficient to support a finding that these interests were outweighed by the need to accomplish an essential state policy, so the conviction was reversed.

The Court elaborated on Riggins in Sell v. United States, 539 U.S. 166, decided on June 16, 2003. The court held:

> . . . the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. 539 U.S. 166, 179.

The court emphasized that the instances where involuntary medication is permitted

> may be rare. That is because the standard says or implies the following:
>
> First, a court must find that **important** governmental interests are at stake. . .
>
> Second, the court must conclude that involuntary medication will **significantly further** those concomitant state interests. . .
>
> Third, the court must conclude that involuntary medication is **necessary** to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.
>
> Fourth, . . . the court must conclude that administration of the drugs is **medically appropriate,** i.e., in the patient's best medical interest in light of his medical condition."
> 539 U.S. 166, 180-181 [emphasis in original]
>
> The question regarding medication for competency purposes was restated as follows:
>
> Has the government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?
> Id., at 183.

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These requirements come into play only when medication is believed to be necessary to make the defendant competent to stand trial. This issue need not be considered "if forced medication is warranted for a different purpose, such as the purposes set out in [Washington v.] Harper [494 U.S. 210 (1990)] related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk." Id., at 2185.

The Committee recommends that § 971.14(5)(d) be interpreted in light of Riggins and Sell to require a specific finding that the need for the ordered medication outweighs the interests of the defendant that the cases identify.

D. If the defendant is found to be incompetent to proceed, the court must determine if regaining competency is likely.

If the court finds that the defendant is not competent to proceed, the court must further determine whether the defendant is likely to become competent within the shorter of the two time periods specified by § 971.14(5)(a):

- within 12 months, or
- within a period equal to the maximum sentence for the most serious offense with which the defendant is charged (if that period is less than 12 months).

These limits were changed to 12 months from 18 months by 1989 Wisconsin Act 31, effective date: August 9, 1989.

In practice, these limits amount to a 12-month limit for Criminal Code felonies because the lowest felony penalty class — Class I — provides for a maximum of 1.5 years imprisonment and 2 years of extended supervision. Most Criminal Code misdemeanors are "Class A" and have a 9-month maximum sentence. There are some Class B and C misdemeanors in the Criminal Code, which have 90-day and 30-day maximum penalties, respectively.

1. Recovery of competency not likely: release

If the court determines that regaining competency within the designated time period is not likely, § 971.14(6)(a) provides that the defendant is to be released, subject to the civil commitment transition provision described in § 971.14(6)(b) and in Sec. VII., B., this Special Material.

2. Recovery of competency likely: commitment

If the court determines that the defendant is likely to become competent within the specified period, the court is to order that the proceedings be suspended and shall commit the defendant to the custody of the department for placement in an appropriate institution. § 971.14(5)(a).

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3. Finding on competence to refuse medication is required

Section 971.14(4)(b) requires a finding on competence to refuse medication:

> If the defendant is found incompetent and if the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment, under the standard specified in sub. (3)(dm), the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment for the defendant's mental condition and that whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.

See the discussion of the right to refuse medication at Sec. IV., G., this Special Material.

E. Commitment as not competent to proceed — § 971.14(5)(a)

1. Basis for commitment

Both of the following bases must exist to support a commitment:

a. The defendant lacks substantial mental capacity to understand the proceedings or assist in his or her own defense; and

b. The defendant is likely to become competent within the commitment period.

2. Length of commitment[8]

The commitment may continue until competency is regained or until the lesser of the following limits is reached:

a. 12 months

The limit on the length of the commitment was reduced to 12 months (from 18 months) by 1989 Wisconsin Act 31, effective date: August 9, 1989.

The 12-month limit will apply to almost all cases where Criminal Code felonies are charged, because the felony class with the shortest penalty, Class I, carries a maximum sentence of 1.5 years confinement and 2 years extended supervision.

b. The maximum sentence for the most serious offense charged

The "maximum sentence" limit will apply only to misdemeanors. Class A misdemeanors carry a 9-month maximum sentence; Class B and C misdemeanors carry 90-day and 30-day maximums, respectively.

3. The commitment order

The commitment order should be executed completely and clearly. (Use of the officially adopted circuit court form is required. See CR-206, available on the state court website: http://www.wicourts.gov/.)

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F. Suspension of the criminal proceedings

The criminal proceedings are "suspended" during the competency commitment. Pretrial motions under § 971.31 may be decided notwithstanding the defendant's lack of competency if they are "susceptible of fair determination prior to trial and without the personal participation of the defendant." § 971.13(3).

G. The right to refuse medication

The Wisconsin Supreme Court has held that all involuntarily committed persons have the right to refuse psychotropic medication. State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 883 (1987). This includes persons committed under § 971.14 as not competent to stand trial.

The requirements of the Jones decision were codified by 1989 Wisconsin Act 31, effective date August 9, 1989. A finding on competence to refuse medication is to be made as part of the initial competency evaluation, if sufficient information is available to the examiner. See § 971.14(3)(dm) discussed at Sec. III., B., this Special Material. A similar finding is also to be made at the time the person is committed as not competent to stand trial. See § 971.14(4)(b) discussed at Sec. IV., D., 3., this Special Material.

If no court order regarding competence to refuse medication was entered at the time of commitment, a procedure for returning to court to obtain such an order is set forth in § 971.14(5)(am). This statute codifies the requirements set forth by the Wisconsin Supreme Court in the Jones case. The standards for the decision on competence to refuse medication are discussed at 141 Wis.2d 710, 739-42, 745-47. Also see Van Rybroek, Miller, and Maier, "A Committed Patient's Right to Refuse Medication," Wis. Bar Bulletin, September 1988, pp. 11-13, 61-63, and Zander, "A Committed Patient's Right of Informed Consent," Wis. Bar Bulletin, November 1988, pp. 45-46, 71-72.

The standard for determining competence to refuse medication is set forth in § 971.14(3)(dm):

> . . . . The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and, after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:
>
> 1. The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> 2. The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

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The necessity and extent of advice on the "advantages, disadvantages and alternatives" in a civil commitment case is discussed in In Matter of Mental Condition of K.S., 147 Wis.2d 575, 433 N.W.2d 291 (Ct. App. 1988).

It is important that hearings be held as quickly as possible so that needed treatment is not delayed. It may help to receive testimony pursuant to the rules on conducting proceedings by telephone or audiovisual means. (The statute quoted above refers to the "procedures and standards specified in [§ 971.14] sub. (4)(b)." Subsection (4)(b) includes a provision for taking testimony by telephone.)[9] The hearing may be conducted by a court commissioner. State ex rel. Jones v. Gerhardstein, supra, 141 Wis.2d 710, 746.

Note that at any stage where a person is found not competent to refuse medication, the effect of a court order is to authorize medication or treatment under appropriate medical standards. (See § 971.14(4)(d).) The statute does not give the court authority to order that specific kinds of treatment be offered.

V. Reexamination and Reports

A. Timing of the reports

The treatment facility is required to reexamine the defendant and report to the court at specified intervals. Written reports are to be furnished to court three months after commitment, six months after commitment, nine months after commitment, and within 30 days of the expiration of the commitment. § 971.14(5)(b).

B. Contents of the reports — § 971.14(5)(b)

Each report shall indicate one of the following:

1. The defendant has become competent; or

2. The defendant remains incompetent but is likely to attain competency within the remaining commitment period; or

3. The defendant has not made such progress that attainment of competency is likely within the remaining commitment period. A report making this indication must include the examiner's opinion regarding whether the defendant is mentally ill, alcoholic, drug dependent, developmentally disabled, or infirm because of aging or other like incapacities.

C. Reexamination hearing

Upon receiving the report, the court shall hold a hearing. The hearing is subject to the same requirements as the original commitment hearing — see § 971.14(4) and section IV., above.[10] The parties may waive the hearing in which case, the finding is to be based on the report.

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If the court determines the defendant is competent, the criminal proceeding shall be resumed. If the court determines the defendant is making sufficient progress toward becoming competent, the commitment shall continue. § 971.14(5)(c)).

VI. The Defendant Who Regains Competency

A. Competency regained

If the court determines that the defendant has become competent, the defendant is to be discharged from the commitment and the criminal proceedings are resumed. § 971.14(5)(c).

B. Competency dependent on medication

If medication has assisted the defendant in regaining competency, the court "may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings." § 971.14(5)(d). But see the discussion at Sec. IV., C., 2. regarding competency restored by medication.

C. Recommitment

If a defendant who has been restored to competency thereafter again becomes incompetent, there may be a recommitment. § 971.14(5)(d). The court must make the same determinations as those required for an original commitment: not competent but likely to become competent within the commitment period.

The maximum period for a recommitment is 18 months, minus the days spent under previous commitments, or 12 months, whichever is less. § 971.14(5)(d).

D. Sentence credit

Sentence credit under § 973.155 is due for all days spent in commitment as not competent to proceed. § 971.14(5)(a). Sentence credit is also required for all days spent during a commitment to an inpatient facility for examination relating to competency to proceed. § 971.14(5)(a).

VII. Competency Not Regained: Discharge from the Commitment

A. Releasing the defendant

If the court determines that it is unlikely that an incompetent defendant will become competent within the remaining commitment period, it shall discharge the defendant from the commitment and release him, subject to the provisions relating to transition and civil commitment. § 971.14(6)(a). (Transition to civil commitment is discussed at Sec. B., below.)

1. Periodic return to court

If a defendant is released, the court may order the defendant to appear in court at specified intervals for redetermination of competency to proceed. § 971.14(6)(a).

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2. Reexamination of competency

"Counsel who have received notice under par. (c) [from custodian of incompetent defendant who was civilly committed] or who otherwise obtain information that a defendant discharged under par. (a) [discharge and release] may have become competent may move the court to order that the defendant undergo a competency examination. . . ." § 971.14(6)(d).

This competency examination is to be conducted under § 971.14(2), the same statute that applies to an original examination. The court may order a report under § 971.14(3) and a hearing under § 971.14(4).

If the court determines that the defendant is competent, the criminal proceeding is resumed.

If the court determines that the defendant is not competent, it shall release the defendant. However, the court "may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent." § 971.14(6)(d).

3. Status of the criminal charges

The above procedures clearly imply that the criminal charges will remain pending. There is no authority for a trial judge to order dismissal sua sponte. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 268, 214 N.W.2d 575 (1974). Dismissal of charges is apparently within the prosecutor's discretion, subject to the general rules relating to speedy trial. Haskins at 267-71.

B. Transition to civil commitment

One of the purposes of the changes made by Chapter 367, Laws of 1981, was to facilitate the transition to civil commitment for persons who had been discharged from a competency commitment.[11]

1. Detention — § 971.14(6)(b)

When a defendant is discharged from a competency commitment, the court may order that he be taken into custody and delivered to one of the following facilities:

a. A facility specified in § 51.15(2) (facilities for the emergency detention of persons undergoing civil mental commitment).

b. An approved public treatment facility under § 51.45(2)(c) (an alcohol treatment facility).

c. An appropriate medical or protective placement facility.

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The length of the detention is governed by the statutes relating to the parallel civil commitments: § 51.20 for civil mental commitment; § 51.45(11) for commitments for alcohol treatment; and § 55.06(11) for protective placements.

2. Commitment "statement"

Either the district attorney or the corporation counsel may prepare the "statement" for commitment. § 971.14(6)(b). It is to be based on the allegations of the criminal complaint and the evidence in the case. The statement must meet the requirements for the related civil petitions: § 51.20(1) for civil mental commitments; § 51.45(13)(a) for alcohol treatment; and § 55.06(11) for protective placements. It need not be corroborated by others and will be treated as the petition for commitment. All conduct "during or subsequent to the time of the offense" may be considered in deciding whether the "recent overt acts" requirement for civil commitment has been satisfied. See § 51.20(1)(am) and Fosdal and Fullin, "Wisconsin's New Competency to Stand Trial Statute," Wis. Bar Bulletin (Oct. 1982) p. 11.

3. Filing the statement

The statement for commitment shall be given to the director of the facility to which the defendant was delivered. It shall be "filed with the branch of circuit court assigned to exercise criminal jurisdiction in the county in which the criminal charges are pending." § 971.14(6)(b). (This apparently refers to the court where the criminal action was pending, Fosdal and Fullin, supra, p. 12.) However, the court may transfer the matter to the branch assigned jurisdiction under Chapter 51.

4. If a person is committed

A person committed under this procedure is treated as though committed under § 51.20, § 51.45, or § 55.06, as applicable. Days spent subject to this commitment do not require sentence credit under § 973.155. § 971.14(6)(b).

5. Notice of transfer or discharge

At least 14 days prior to transfer, discharge, or expiration of the commitment order, the § 51.42 or § 51.437 board must notify the court which originally discharged the person from the competency commitment, the district attorney for the county in which that court is located, and the person's attorney of record. § 971.14(6)(c).

6. Subsequent competency examinations

Upon receiving the above notice or upon receiving other information that the defendant is competent to proceed, either the district attorney or defense counsel may move the court to order another competency examination under § 971.14(2). The procedures relating to the original evaluation of competency apply. § 971.14(6)(d).

If the court determines that the defendant is competent, the criminal proceedings shall be resumed. If the court determines that the defendant is not competent, it shall order release but may impose such reasonable nonmonetary conditions as will protect the public and

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enable the court and district attorney to discover whether the person subsequently becomes competent. § 971.14(6)(d).

COMMENT

SM-50 was originally published in 1974 and revised in 1986, 1988, 1989, 1991, and 1997. This revision was approved by the Committee in April 2004.

This Special Material is intended to outline the statutory procedures relating to determining a defendant's competency to stand trial.

The 2004 revision withdrew three appendices. Appendix A was a letter describing the "local sites" project of the Department of Health and Family Services, which is intended to provide faster and less expensive competency evaluations. Trial courts generally receive periodic updates on the local sites assigned to their courts. Appendix B illustrated a completed order for competency evaluation. Appendix C illustrated a completed order for commitment for treatment. The forms for these orders are available on the state court website. See CR-205 and CR-206, at http://www.wicourts.gov/.

The competency procedures set forth in § 971.14 apply to persons facing commitment as sexually violent persons under Chapter 980. State v. Smith, 229 Wis.2d 720, 600 N.W.2d 258 (Ct. App. 1999).

1. This basic standard for competency is sometimes elaborated upon by reference to more specific abilities and characteristics. In State v. Garfoot, the court noted that "[t]o elicit information about a defendant's competence, many courts and experts rely on a 13-point checklist known as the "McGarry Scale" or "Competency to Stand Trial Instrument," and made reference to State v. Shields, 593 A.2d 986 (Del. Super. 1990), which in turn refers to a detailed list of factors. 207 Wis.2d 215, 228, n.7.

2. It is assumed that a person committed for a competency examination will always be represented by counsel or will have waived counsel. A person must at least be afforded the opportunity to be represented, not only because it is constitutionally required (the criminal prosecution has begun) but also because medical ethics preclude conducting a competency examination of any person charged with crime "prior to access to or availability of legal counsel." American Psychiatric Association Ethical Guidelines, Section 4, Number 13.

3. Receipt of telephone testimony was first authorized by Order of the Wisconsin Supreme Court dated October 29, 1987. 143 Wis.2d xxi-xli. Also see Fullin and Williams, "Teleconferencing Comes To Wisconsin Courts," Wis. Bar Bulletin, January 1988, pp. 8-10, 70-71. The standard for allowing testimony by telephone was amended by Order of the Wisconsin Supreme Court dated October 31, 1990, effective January 1, 1991.

4. Examiners are ethically prohibited from examining a person charged with a crime who has not had access to counsel. See note 2, supra.

5. The 15-day limit under § 971.14(2)(am) does not begin to run until the defendant arrives at the examination facility; the limit did not apply where the court's order was not reduced to writing and the defendant was never transported to the examination facility. State ex rel. Hager v. Marten, 226 Wis.2d 687, 594 N.W.2d 791 (1999).

6. See note 3, supra.

7. Subsection (4) of § 971.14 contains two different burdens of persuasion, depending on what the defendant claims with regard to competency. This possibly awkward approach was adopted in an attempt to serve two different interests. The statute requires the state to prove competency by the greater weight of the evidence to serve the basic due process requirement that an incompetent defendant may not be tried. The

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statute requires the state to prove incompetency by clear and convincing evidence to justify the involuntary commitment for treatment of the defendant who is found to lack competency. This approach was developed in an attempt to meet requirements that were believed to follow from the analogy made between involuntary civil mental commitments and commitments of those found not competent to stand trial. The United States Supreme Court has addressed some aspects of this issue since § 971.14 was adopted in its present form.

In Medina v. California, 505 U.S. 437, 439 (1972), the court held that "the Due Process Clause permits a State to require a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence." In Cooper v. Oklahoma, 517 U.S. 348 (1996), the Court held that an Oklahoma statute requiring the defendant to prove lack of competency by clear and convincing evidence violated the Due Process Clause. And, in Addington v. Texas, 441 U.S. 418 (1979), the Court held that the "clear and convincing evidence" burden satisfies the requirements of due process for the purposes of civil mental commitment. The Wisconsin two-step approach clearly complies with these due process-based requirements.

The constitutionality of the Wisconsin statutory scheme regarding the burden of persuasion was upheld in State v. Wanta, 224 Wis.2d 679, 592 N.W.2d 645 (Ct. App. 1999).

8. Under pre-Truth In Sentencing law, good time credit is to be accorded persons committed as incompetent to stand trial. State v. Moore, 167 Wis.2d 491, 481 N.W.2d 633 (1992).

9. See note 3, supra.

10. Testimony may be received by telephone. See note 3, supra.

11. For a case illustrating the transition from a competency commitment to a civil mental commitment, see In Re the Mental Condition of Billy Jo W., 182 Wis.2d 616, 514 N.W.2d 707 (1994). In that case, the court held that in certain circumstances a court may order the release of civil commitment records where there is a "significant interrelationship between criminal proceedings involving a violent felony and the civil commitment." 182 Wis.2d 616, 649. Upon making a threshold determination that the interrelationship exists, the court must balance the public interest in access against the individual's privacy interest.

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SM-50A ADVICE TO A PERSON FOUND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

[RENUMBERED — SEE WIS JI-CRIMINAL 650]

COMMENT

SM-50A was originally published in 1974 and revised in 1980 and 1990. It was renumbered as Wis JI-Criminal 650 and reapproved by the Committee in June 2003.

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SM-52 DISCLOSURE OF THE IDENTITY OF AN INFORMER

Section 905.10(1) recognizes a privilege on the part of the government "to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of the law."[1] The privilege may be claimed by an appropriate representative of the federal government or of the state or local government unit involved.[2]

The privilege does not exist if the informer or the holder of the privilege discloses the identity of the informer "to those who would have cause to resent the communication."[3] The privilege also does not exist if the informer appears as a witness for the state.[4]

There are two instances where a court may be called upon to conduct an inquiry into whether the identity of an informer should be disclosed despite the existence of the privilege. One occurs at the pretrial stage, where information from an informer is relied upon to establish the legality of obtaining evidence. The other occurs at trial where the defendant seeks the testimony of the informer. Different procedures and standards apply to the disclosure inquiry in these two situations.

I. Pretrial Disclosure: Legality of Obtaining Evidence

In the context of a motion to suppress evidence, the informer's identity relates to evaluating his or her reliability and credibility as part of the probable cause determination. Where an informer has provided information relied upon to establish the legality of, for example, a search and seizure, disclosure of identity may be required if "the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible." § 905.10(3)(c).

If the judge orders disclosure, the state may request that the disclosure be made in-camera. If the request is made, the judge "shall" direct[5] that the disclosure be made in-camera. No counsel or party is permitted to be present. A record of the in-camera proceeding is to be made, but it is to be sealed and preserved to be made available in the event of an appeal.

II. Disclosure at Trial : Testimony on the Merits

Disclosure of an informer's identity at trial may become an issue when "it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence." § 905.10(3)(b). Upon such a showing, the court shall give the state an opportunity to oppose

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disclosure in an in-camera proceeding. The amount of evidence required to justify the inquiry has been referred to as a "minimal burden. . . . The showing need only be one of a possibility that the informer could supply testimony necessary to a fair determination."[6]

The in-camera proceeding is to provide the state "an opportunity to show . . . facts relevant to determining whether the informer can, in fact, supply"[7] testimony necessary to a fair determination of guilt or innocence. The statute provides that the showing will ordinarily be in the form of affidavits but that the judge may direct that testimony may be taken. No counsel or party shall be permitted to be present at the in-camera proceeding.

The standard for deciding whether the informer's identity may be disclosed was stated in State v. Vanmanivong, 2003 WI 51, 261 Wis.2d 202, 661 N.W.2d 76, ¶24: ". . . a defendant must show that an informer's testimony is necessary to the defense before a court may require disclosure. 'Necessary' in this context means that the evidence must support an asserted defense to the degree that the evidence could create a reasonable doubt."[8]

The decision on whether to order disclosure is within the discretion of the trial court. The court should make sufficient findings "to show that its conclusion was reached by a reasoning process based on the facts of record or reasonable inferences from those facts."[9]

If the court concludes that the informer can give testimony that meets the "necessary" standard, and if the state elects not to disclose the informer's identity, the judge shall dismiss the charges to which the testimony would relate.[10]

Evidence submitted for the in-camera proceeding shall be sealed and preserved for possible reference on appeal. It is not to be otherwise revealed without the consent of the state.

COMMENT

SM-52 was originally published in 1991. This revision was approved by the Committee in October 2004.

1. Procedures relating to deciding whether an informer's identity must be disclosed are set forth in considerable detail in § 905.10 of the Wisconsin Rules of Evidence. The statute is based in part on preexisting Wisconsin precedent, see Stelloh v. Liban, 21 Wis.2d 119, 126, 124 N.W.2d 101 (1963), and is consistent with the reasoning of the principal United States Supreme Court case, Roviaro v. United States, 353 U.S. 53 (1957). See State v. Outlaw, 108 Wis.2d 112, 120-24, 321 N.W.2d 145 (1982).

The privilege protects not only the identity of the informer but also the contents of a communication that will tend to reveal the identity. State v. Gordon, 159 Wis.2d 335, 464 N.W.2d 91 (Ct. App. 1990).

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2. Section 905.10(2) "Who May Claim. The privilege may be claimed by an appropriate representative of the federal government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof." The text of this Special Material refers only to "the state," on the assumption that the majority of Wisconsin cases will involve the claim of privilege by the state.

3. Section 905.10(3)(a). "[T]he State is the holder of the privilege . . . disclosure by the confidential informer's attorney . . . without specific authorization by the informer, is not 'by the informer's own action.'" State v. Lass, 194 Wis.2d 591, 598, 535 N.W.2d 904 (1995). Lass also concluded that the privilege survives the death of the confidential informer.

4. The full statement in § 905.10(3)(a) is "as a witness for the federal government or a state or subdivision thereof."

5. Section 905.10(3)(c) provides in part: "The judge shall on the request of the federal government, state or subdivision thereof, direct that the disclosure be made in-camera."

See State v. Fischer, 147 Wis.2d 694, 433 N.W.2d 647 (Ct. App. 1988), for a case finding there was an insufficient showing to require disclosure.

6. State v. Outlaw, 108 Wis.2d 112, 126, 321 N.W.2d 145 (1982). For a case finding no "showing whatsoever," see State v. Hargrove, 159 Wis.2d 69, 70, 464 N.W.2d 14 (Ct. App. 1990). An in-camera proceeding is not necessary if, without one, the trial court concludes that the informant "could provide relevant testimony necessary to a fair determination on the issue of guilt or innocence." State v. Norfleet, 2002 WI App. 140, 254 Wis.2d 569, 582-83, 647 N.W.2d 341.

7. Section 905.10(3)(b).

8. The Vanmanivong decision based this standard on State v. Outlaw, 108 Wis.2d 112, 126, 321 N.W.2d 145 (1982). The rule of the Outlaw case is found in the concurring opinions in which four justices joined because only three justices joined in the lead opinion. State v. Dowe, 120 Wis.2d 192, 352 N.W.2d 660 (1984).

The disagreement in the Outlaw case was over the meaning of "necessary" in the phrase "necessary to a fair determination of the issue of guilt or innocence." The definition in the concurring opinion was approved by a majority of the court: "an informer's testimony is necessary if it could have created in the minds of the jurors a reasonable doubt regarding a defendant's guilt." 108 Wis.2d 112, 140 Further, the concurrence "would limit the test to evidence being necessary to support the theory of defense." 108 Wis.2d 112, 141. [Otherwise, evidence corroborating guilt would result in the disclosure of an informant's identity.] A second concurring opinion was also joined in by four justices and added two caveats to the "necessary" definition: evidence that is merely cumulative cannot be necessary; and evidence is not necessary if it is also available from another source. 108 Wis.2d 112, 142.

The previously published version of this Special Material summarized the Outlaw rule as follows: the test for disclosure of the informer's identity is whether there is a reasonable probability that the informer could give testimony necessary to the defense. All justices in Outlaw agreed that the state is not required to show beyond a reasonable doubt that the informer's testimony would not be helpful to the defense. (See

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the lead opinion at 108 Wis.2d 127 and the concurring opinion at 108 Wis.2d 138.) Testimony is necessary to the defense when it could create in the minds of the jurors a reasonable doubt about guilt. Testimony is not necessary when it is cumulative or available from another source.

9. State v. Larsen, 141 Wis.2d 412, 420, 415 N.W.2d 535 (Ct .App. 1987). Also see Outlaw, supra, 108 Wis.2d 112, 128. A finding denying disclosure in the following terms was found to fail to show that discretion was exercised: "I do not consider that there is a reasonable probability that the testimony of either informer would be able to give testimony necessary to a fair determination of guilt or innocence." 141 Wis.2d 412, 419-20.

For a review of the application of the complete procedure required by § 905.10, see State v. Gerard, 180 Wis.2d 327, 509 N.W.2d 112 (Ct. App. 1993).

10. Section 905.10(3)(b) states that the judge "shall" dismiss the charges upon motion by the defense and "may" do so on the court's own motion.

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SM-55 INQUIRY WHEN A WITNESS CLAIMS THE PRIVILEGE AGAINST SELF-INCRIMINATION

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SM-55 INQUIRY WHEN A WITNESS CLAIMS THE PRIVILEGE AGAINST SELF-INCRIMINATION

I. Introduction

This Special Material outlines the procedures a trial judge should follow when a witness asserts the privilege against self-incrimination.

The privilege is recognized in identical terms by both the United States and Wisconsin Constitutions[1]: "nor shall [a person] be compelled in any criminal case to be a witness against himself."

The privilege can be raised in a variety of situations in a criminal case: at a grand jury or John Doe hearing; at a preliminary examination; at a hearing on a pretrial motion; or at trial. The same basic procedure applies regardless of the situation.

One response to a valid claim of the privilege is to order the witness to testify, thereby granting immunity. Sections 972.08 and 972.085 provide the statutory recognition for immunity in criminal cases. A number of other statutes spell out procedures for immunity in a variety of other situations.[2] All immunity statutes are interpreted in the same way — as coextensive with the constitutional privilege.[3]

Discussed here are issues relating to the requirements for a valid claim of the privilege, the granting of immunity to who one invokes the privilege, and immunity for defense witnesses.

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II. Invoking the Privilege

A. Should not be claimed in the presence of the jury

Section 905.13(2) provides as follows:

> In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

It is especially important to see that this rule is followed with respect to the privilege against self-incrimination. The burden properly falls on the attorney who calls the witness to assure that the witness is not expected to assert the privilege upon taking the stand. See §§ 3-5.7(c) and 4-7.6(c) of the ABA Standards Relating To Criminal Justice relating to the duty of counsel where a witness is expected to claim a valid privilege not to testify.

In State v. Heft, 185 Wis.2d 289, 517 N.W.2d 494 (1994), the defendant argued that her rights to due process and equal protection were denied by the trial court's application of § 905.13. The trial court had denied the defendant's request to require a witness to claim the privilege against self-incrimination in the presence of the jury. The Wisconsin Supreme Court affirmed the decision of the court of appeals[4] that the right to present a defense was not significantly infringed; Heft was allowed to present a complete defense by introducing other evidence that the witness' driving, not Heft's, was the cause of the accident. The court also held that the fact that § 905.13 applies to criminal but not to civil cases does not deny equal protection of the law to criminal defendants. There are reasonable bases for the distinction which are rationally related to legitimate state interests: the consequences of a criminal conviction are much more

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severe; the need for mutuality in light of the inability to comment on the defendant's decision not to testify; and the concern for collusion.[5]

If the privilege is unexpectedly invoked before the jury, an inquiry should be conducted outside the jury's presence. (See below.) A cautionary instruction should be given if requested but only if requested. See § 905.13(3) and Wis JI-Criminal 317.[6]

B. How the privilege is invoked

No particular statement is required to invoke the privilege. A literally correct invocation would be that the witness "declines to answer on the ground that the answer might tend to incriminate the witness." But no precise formula is required:

> [i]t is agreed by all that a claim of privilege does not require any special combination of words. . . .
>
> [T]he fact that a witness expresses his intention in vague form is immaterial so long as the claim is sufficiently definite to apprise the [court] of his intention. As everyone agrees, no ritualistic formula is necessary.

Quinn v. United States, 349 U.S. 155, 162 (1955), cited in State v. Worgull, 128 Wis.2d 1, 13, 381 N.W.2d 547 (1986).

A claim of privilege as to one question does not necessarily carry over to other questions, especially where they are directed toward a different area. See State v. Hall, 65 Wis.2d 18, 28-30, 221 N.W.2d 806 (1974).

III. Court Inquiry When the Privilege is Invoked

When the privilege is invoked, the court must conduct an inquiry to determine whether the claim of privilege is valid.[7] The privilege is personal to the witness; it applies only to "testimonial" evidence; and it extends to responses that might tend to "incriminate" the witness.

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A. The privilege is personal to the witness

1. The witness cannot refuse to answer on the ground that the answer might incriminate another person.[8]

2. Corporations cannot invoke the privilege.[9]

B. The privilege applies only to "testimonial" evidence

1. "Testimonial" defined

> The distinction which has emerged . . . is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not.

Schmerber v. United States, 384 U.S. 757, 764 (1966); cited in State v. Driver, 59 Wis.2d 35, 40, 207 N.W.2d 850 (1973).

2. The privilege does not apply to physical evidence

The privilege does not extend to physical evidence, even if the witness is required to be the source of that evidence or to participate in the obtaining or displaying of the evidence. For example, the following practices do not implicate the privilege:

a. fingerprinting[10]

b. participating in a lineup[11]

c. providing a voice sample or speaking certain words[12]

d. trying on a shirt[13]

e. taking blood samples[14]

C. The evidence must "tend to incriminate" the witness

In State ex rel. Rizzo v. County Court, 32 Wis.2d 642,146 N.W.2d 499 (1966), the Wisconsin Supreme Court approved the following definition of incriminating evidence:

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> A matter is incriminating or tends to incriminate whenever, in the probable operation of law or the ordinary happening of events, there would be reasonable grounds to apprehend dangers to the witness from his being compelled to answer questions about which he has a particular personal knowledge. Maloney, A Code of Evidence for Wisconsin — Self-Incrimination, 1946 Wis. L. Rev. 147, 155.

The United States Supreme Court in Kastigar v. United States, 406 U.S. 441, 445 (1972), stated that the Fifth Amendment privilege ". . . protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."

The privilege may be validly claimed even after the witness has pleaded guilty. Since sentencing remains, testimony could result in "injurious disclosure." State v. Seibert, 141 Wis.2d 753, 416 N.W.2d 900 (Ct. App. 1987). After conviction, the privilege survives through postconviction attack and appeal. State v. Anastas, 107 Wis.2d 270, 320 N.W.2d 15 (Ct. App. 1982).[15]

D. Determining the validity of the claim without requiring self-incrimination

While an inquiry must be made into the validity of the claim, a valid claim could be compromised if the inquiry is too detailed or extensive. That is, witnesses should not be required to incriminate themselves in the process of establishing the validity of their claim. For this reason, courts have been urged to extend substantial deference to the claim.

There is apparently no authority in Wisconsin for conducting an in camera inquiry into the validity of the claim of privilege and then sealing the record. However, adopting such a procedure ought to lie within the inherent powers of the trial court. A model is offered by the procedure set forth in § 905.10, which sets forth an in camera

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procedure for determining whether a confidential informant's identity must be disclosed. (See SM-52, Disclosure of the Identity of an Informer.)

E. The court should make a finding

1. The following is suggested as a finding:

"The court finds that the (evidence) (answer) demanded of the witness (might tend to incriminate) (could not incriminate) him because, in the probable operation of the law or the ordinary happening of events there (are) (are not) reasonable grounds to apprehend dangers to the witness."[16]

F. Further action if the claim of privilege is not valid

1. Order the witness to testify

The following is suggested as a statement for the trial court to make to the witness:

"The court has concluded that the [question(s)] [request(s) for evidence] directed to you do not violate your privilege against self-incrimination. Therefore, you are ordered to (answer the question(s)) (produce the evidence demanded)."

2. If the witness continues to refuse continue with the following:

"If you do not now produce the evidence requested, you may be summarily confined until such time as you are willing to do so, or until this (trial) (grand jury term) (John Doe investigation) is completed, but in no case exceeding one year. You may not be

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released on bail pending an appeal concerning such confinement."

If the witness now refuses to comply with the order, the court may order the witness' summary confinement as provided by Wis. Stat. § 972.08(2).[17]

G. Further action if the claim of privilege is valid

1. excuse the witness
2. strike previous testimony[18]
3. give cautionary instructions[19]
4. order the witness to testify, resulting in a grant of immunity (see Section IV., below)

IV. Grants of Immunity

A. Requirements

A witness is granted immunity when all of the following occur:

1. there is a valid claim of the privilege against self-incrimination
2. the prosecutor moves to compel the testimony
3. the court orders the witness to testify
4. the witness complies with the order

It is within the court's discretion to grant or to deny the prosecutor's motion to compel testimony. If the court grants the motion and orders the witness to answer or to produce evidence, and if the witness complies with such order, the witness is automatically invested with immunity under Wis. Stat. § 972.08.

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B. Testimony after the order

1. Immunity is "automatic"

Strictly speaking, there need be no motion for a grant of immunity and, accordingly, no order granting immunity. Rather, immunity is the automatic result of testimony following an order to testify after a valid claim of the privilege against self-incrimination. The operative language is found in § 972.08(1)(a):

> Whenever any person refuses to testify or produce books, papers or documents when required to do so before any grand jury, in a proceeding under § 968.26 or at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court on motion of the district attorney. No person who testifies or produces evidence in obedience to the command of the court in that case may be liable to any forfeiture or penalty for or on account of testifying or producing evidence, but no person may be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

2. Immunity is "use" immunity

The 1989-90 legislature changed immunity in Wisconsin from the broader "transactional" immunity to the narrower "use," or "use and fruits" immunity.[20] Section 972.08(1)(b) provides that all immunity is "subject to the restrictions under § 972.085," which reads as follows:

> Immunity from criminal or forfeiture prosecution under §§ 13.35, 17.16(7), 77.61(12), 93.17, 111.07(2)(b), 128.16, 133.15, 139.20, 139.39(5), 195.048, 196.48, 551.56(3), 553.55(3), 601.62(5), 767.47(4), 767.65(21), 776.23, 885.15, 885.24, 885.25(2), 891.39(2), 968.26, 972.08(1) and 979.07(1), provides immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.

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Thus, the statute provides "immunity only from the use of the compelled testimony or evidence . . . as well as immunity from the use of evidence derived from that compelled testimony or evidence." Whether evidence sought to be used in a later prosecution is protected by the immunity statute is obviously of concern only in the later prosecution. Immunity extends to subsequent criminal or forfeiture proceedings. It does not extend to protect from prosecution or punishment for perjury or false swearing committed in the course of testifying. See Wis JI-Criminal 246 for a suggested instruction on the testimony of a witness who has received immunity.[21]

3. Bargained-for immunity: Nonprosecution agreements

As described above, immunity results from ordering a person to testify after a valid claim of privilege. The order can only follow a motion by the prosecutor. In many cases, there may be agreements with the witness, whereby concessions, including immunity, are granted in exchange for the witness' testimony. The legal effect of statutory immunity is limited to "use" immunity. Given that the broader "transactional" immunity is more attractive to the witness, what is the effect of a prosecutor's promise to, in effect, grant transactional immunity to a witness in exchange for testimony?

The Wisconsin Court of Appeals dealt with a so-called nonprosecution agreement in State v. Lukensmeyer, 140 Wis.2d 92, 409 N.W.2d 395 (Ct. App. 1987). The agreement, reduced to writing, granted Lukensmeyer "immunity" in return for truthful testimony in a murder prosecution. The court found that Lukensmeyer had breached the agreement and could be prosecuted. But the court noted that his challenge to the nonprosecution agreement was a question of first impression in Wisconsin: "Because

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neither party raised it, we do not reach the question of the agreement's fundamental validity. We assume, but do not decide, that a prosecutor may lawfully enter an agreement not to prosecute in return for cooperation in a criminal investigation." 140 Wis.2d 92, 102.

The question may be more important now that statutory immunity is only of the "use" variety. One could argue that the prosecutor should not be able to grant broader immunity than the statutes allow. As a practical matter, of course, prosecutors may exercise their discretion not to prosecute virtually without review. And in the process of plea negotiations charges are routinely dropped, which could be characterized as immunity on those dropped charges. Lukensmeyer appears to have it right: all agreements by the prosecutor, whether designated as "immunity" or not, need to be reviewed under the general rules relating to the fulfillment and breach of plea agreements.[22]

V. Immunity for Defense Witnesses

Immunity may be granted only upon the motion of the prosecutor. The court cannot grant immunity sua sponte; the defendant does not have the right to compel the state to request immunity for a defense witness. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975).

While the defendant has no reciprocal right to immunity grants for defense witnesses, the rule is tempered by two considerations. First, the Wisconsin Supreme Court has noted that the prosecutor's duty is "'to seek justice, not merely to convict.'

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When the prosecutor is considering whether or not to make a motion for immunity, he should bear in mind this predominant objective of impartial justice, and not merely whether the evidence will be favorable to the prosecution. He should not hesitate to move for immunity solely on the basis that the testimony thus elicited might exonerate the defendant." Peters, supra, 70 Wis.2d 22, 41. Second, developments in other contexts suggest that a prosecutor's refusal to request immunity for a defense witness based solely on tactical considerations may violate due process. See McMorris v. Israel, 643 F.2d 458 (7th Cir. 1981), where, under Wisconsin's since-abandoned polygraph stipulation rule, it was held that a prosecutor must have valid, nontactical reasons for refusing to enter into a stipulation.

The law on this topic was reviewed in State v. Evers, 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991). Peters and Sanders, supra, were reviewed and a standard was adopted to identify the showing a defendant must make to obtain judicial review of a prosecutor's immunization decision: "To demonstrate an abuse of prosecutorial discretion, a defendant must make a substantial evidentiary showing that the government intended to distort the judicial fact-finding process. See Stuart v. Gagnon, 614 F.Supp. 247 (E.D. Wis. 1985)." 163 Wis.2d 725, 737.

COMMENT

SM-55 was originally published in 1974. This revision was approved by the Committee in October 1994.

1. The privilege is found in the 5th Amendment to the United States Constitution and in Article 1, § 8. The latter differs in one respect from the former; it refers to being compelled to be "a witness against himself or herself." (Emphasis added.)

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2. The immunity statutes are listed in § 972.085.

3. See, for example, State v. Hall, 65 Wis.2d 18, 27, 221 N.W.2d 806 (1974); State v. Aliota, 64 Wis.2d 354, 361, 219 N.W.2d 585 (1974).

4. 178 Wis.2d 823, 505 N.W.2d 437 (Ct. App. 1993).

5. 185 Wis.2d 289, 302, 517 N.W.2d 494 (1994).

6. Wis JI-Criminal 317 reads as follows:

> A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate the witness.
>
> (Name of witness)'s decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

7. "The trial court has a clear responsibility to make a full record that the witness' fear of incrimination is valid, real and appreciable, and not speculative or merely an imaginary possibility of incriminatory danger." State v. Harris, 92 Wis.2d 836, 844-45, 285 N.W.2d 917 (Ct. App. 1979). Also see State v. McConnohie, 121 Wis.2d 57, 68-71, 358 N.W.2d 256 (1984).

8. Hale v. Henkel, 201 U.S. 43 (1970).

9. Braswell v. United States, 487 U.S. 99 (1988).

10. United States v. Peters, 687 F.2d 1295 (10th Cir. 1982).

11. United States v. Wade, 388 U.S. 218 (1967).

12. United States v. Dionisio, 410 U.S. 1 (1973).

13. Holt v. United States, 218 U.S. 245 (1910).

14. Schmerber v. United States, 384 U.S. 757 (1966).

15. Also see State v. McConnohie, 121 Wis.2d 57, 358 N.W.2d 256 (1984). State v. Harris, 92 Wis.2d 836, 285 N.W.2d 917 (Ct. App. 1979).

16. This suggested finding is based on the quotation from State ex rel. Rizzo v. County Court, found at page 5 of this Special Material.

17. But see State v. Gonzalaz, 172 Wis.2d 576, 493 N.W.2d 410 (Ct. App. 1992), holding that the summary contempt power of § 978.08(2) is not applicable to a pretrial motion hearing.

18. State v. Robinson, 145 Wis.2d 273, 426 N.W.2d 606 (Ct. App. 1988); Robinson v. State, 100 Wis.2d 152, 301 N.W.2d 429 (1981); State v. Koller, 87 Wis.2d 253, 274 N.W.2d 651 (1977); Ryan v. State, 95 Wis.2d 83, 289 N.W.2d 349 (Ct. App. 1980).

19. See Wis JI-Criminal 317, note 6, supra.

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20. "Transactional immunity is essentially a promise not to prosecute the immunized witness for the transaction about which he testifies. In contrast, use . . . immunity . . . preserves the possibility of prosecution of the witness, provided that the government can prove that it did not use the witness's testimony in . . . proving his guilt at trial." BNA Criminal Practice Manual, Immunity, 111:2402-03.

21. Wis JI-Criminal 246 reads as follows:

> You have heard the testimony of (name of witness) who has received immunity. This means that (name of witness') testimony and evidence derived from that testimony cannot be used in a later criminal prosecution of (name of witness).
>
> This witness, like any other witness, may be prosecuted for testifying falsely.
>
> You should consider whether receiving immunity affected the testimony and give the testimony the weight you feel it deserves.

22. "Informal" immunity and other plea concessions should be brought to jury's attention. See the Comment to Wis JI-Criminal 245 and 246.

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SM-60 PROCEDURE TO DETERMINE THE ADMISSIBILITY OF STATEMENTS OR CONFESSIONS OF THE DEFENDANT

[WITHDRAWN]

COMMENT

SM-60 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Suppression – Confessions" at CR 15, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-61 PROCEDURE TO FOLLOW WHEN THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE IS AT ISSUE PRIOR TO OR DURING A CRIMINAL TRIAL

[WITHDRAWN]

COMMENT

SM-61 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Substitution of Judge/Recusal" at CR 6, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-62 ADMISSIBILITY OF EVIDENCE OBTAINED BY A SEARCH AND SEIZURE

[WITHDRAWN]

COMMENT

SM-62 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Suppression – Search and Seizure" at CR 13, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-70 POST-CONVICTION PROCEDURE UNDER SECTION 974.06, WIS. STATS.

[WITHDRAWN]

COMMENT

SM-70 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "§ 974.06 Motions" at CR 39, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-80 HABEAS CORPUS

[WITHDRAWN]

COMMENT

SM-80 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Habeas Corpus" at CR 43, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-90 PROCEDURE TO FOLLOW IN ADVISING A PRISONER OF RIGHTS UNDER THE UNIFORM DETAINER ACT

WHEN ANOTHER JURISDICTION[1] FILES A WRITTEN REQUEST FOR TEMPORARY CUSTODY OR AVAILABILITY OF A PRISONER WITH THE WARDEN OF AN INSTITUTION (OR WITH THE SHERIFF IN CHARGE OF A COUNTY JAIL),[2] THE PRISONER IS TO BE TAKEN FORTHWITH BEFORE A JUDGE OF A COURT OF RECORD.[3] THE JUDGE SHOULD EXAMINE THE REQUEST FOR A TEMPORARY CUSTODY TO ASSURE THAT IT HAS BEEN DULY APPROVED, RECORDED, AND TRANSMITTED BY THE COURT HAVING JURISDICTION OVER THE INDICTMENT, INFORMATION OR COMPLAINT UPON WHICH THE REQUEST IS BASED.[4]

IF THE REQUEST IS IN PROPER FORM, THE COURT SHOULD ADVISE THE PRISONER AS FOLLOWS:

A request for your temporary custody or availability under Article IV of the Uniform Detainer Act was received on (date request received by warden or sheriff) from (name of officer and jurisdiction). You are charged with committing the offense of (name of offense), on (date offense committed), in (site of offense). (SPECIFY ALL OFFENSES LISTED IN THE REQUEST.) The request for temporary custody means that (receiving state) wants to have you returned to stand trial on the charge(s) I have just described to you. If you are returned to (receiving state), you may also be tried on other charges upon which detainers have been filed.[5] Trial must be commenced within 120 days of your arrival in (receiving state), unless a continuance has been granted in open court in your presence or the presence of your counsel.[6] After the charges are resolved, you will be returned to Wisconsin to complete your present sentence.

Authorities from (receiving state) will be able to pick you up after 30 days have elapsed from the date the request was received unless the governor of Wisconsin

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disapproves the request within that period of time. You have the right to petition the governor to ask that he disapprove the request.[7] You may petition the governor by writing the following person:

Pardon and Extradition Counsel

Office of the Governor

State Capitol Building

Madison, Wisconsin 53702

You may not oppose your delivery to the authorities from (receiving state) on the ground that the governor has not affirmatively consented to or ordered the delivery.[8]

You also have the right to contest your delivery in court[9] and to be represented by an attorney. If you cannot afford to hire an attorney, one will be appointed for you. If you wish to contest the matter in court, the only issues will be the sufficiency of the request for temporary custody and your identification as the person sought.[10] Your guilt or innocence on the criminal charge(s) will not be inquired into. If you wish to contest your delivery in court you must request a hearing promptly; the hearing must be held within 30 days after the request for temporary custody was received.

Do you understand your rights as I have just described them to you?

And do you understand that if you wish to contest your delivery to (receiving state), either by petitioning the governor or by requesting a court hearing, or both, the matter must be resolved within 30 days after the request for temporary custody was received, which will be (specify date)?

[END OF ADVICE TO PRISONER]

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IF THE PRISONER REQUESTS COUNSEL, COUNSEL SHOULD BE APPOINTED IMMEDIATELY.

IF THE PRISONER REQUESTS A COURT HEARING TO CONTEST DELIVERY, A DATE SHOULD BE SET WITHIN THE 30-DAY PERIOD FOLLOWING THE RECEIPT OF THE REQUEST.

IF THE PRISONER INDICATES THAT HE OR SHE DOES NOT WISH TO CONTEST DELIVERY PURSUANT TO THE REQUEST FOR TEMPORARY CUSTODY, THE COURT SHOULD EMPHASIZE THAT NO FURTHER LEGAL PROCEEDINGS WILL BE REQUIRED AND THAT THE PRISONER WILL BE MADE AVAILABLE TO THE AUTHORITIES FROM THE RECEIVING STATE AT THE END OF THE 30-DAY PERIOD.[11]

IF THE PRISONER INDICATES THAT HE OR SHE DOES NOT KNOW WHAT TO DO, EMPHASIZE THAT THE PRISONER HAS THE RIGHT TO CONSULT WITH COUNSEL, AND THE RIGHT TO HAVE COUNSEL APPOINTED IF INDIGENT, TO ASSIST IN MAKING THE DECISION.

COMMENT

SM-90 was originally published in 1980. This revision involved nonsubstantive editorial changes and updated the comment. It was approved by the Committee in February 1998.

The procedures described in this Special Material are required by Wis. Stat. § 976.06 created by Chapter 158, Laws of 1975. The statute is designed to remedy the deficiencies in the Uniform Detainer Act identified by the Wisconsin Supreme Court in State ex rel. Garner v. Gray, 55 Wis.2d 574, 201 N.W.2d 163 (1972). In Garner, the court held the Uniform Detainer Act unconstitutional because it failed to require that the prisoner be advised of his rights to contest his delivery under the detainer by petitioning the governor and by going to court. To remedy the defect, the court required that prisoners be taken before a judge to be advised of these rights. Section 976.06 is modelled after § 976.03(10) of the Uniform Criminal Extradition Act.

The usual sequence of events leading up to this court appearance begins with the receipt by the custodian (sheriff, prison warden) of what is broadly called a detainer. A detainer, also called a "hold" or "hold order," is a notice of a criminal charge pending against a prison inmate, given by law enforcement or prosecuting officials to prison authorities to insure that after the completion of the prisoner's present sentence he will be held until turned over to the notifying authorities for prosecution. The detainer usually consists of a letter or other written document accompanied by a copy of the outstanding warrant, information, or indictment. (Jacob and Sharma, "Justice After Trial: Prisoners' Need For Legal Services In The Criminal-Correctional Process," 18 Kansas L. Rev. 495, 579 (1970).)

Out of recognition that the existence of a detainer can have a detrimental effect on such aspects of the prisoner's confinement as custody classification, parole eligibility, work-release eligibility, and parole planning, many states, including Wisconsin, have adopted the Uniform Detainer Act (Wis. Stat. § 976.05). (A list of states which have adopted the Act follows as Appendix A.) The Act's purpose is to encourage the expeditious and orderly disposition of charges outstanding against a prisoner and to

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determine the proper status of any and all detainers based on untried indictments, information or complaints (§ 976.05(1) Article I). Both prisoners and prosecuting authorities may initiate proceedings under the Act, and different procedures apply depending upon who initiates the action.

The Act requires that upon receipt of a detainer, the warden promptly inform the prisoner of its source and contents. The prisoner must also be informed of the right to request final disposition of the charge on which the detainer is based. If the prisoner makes that request, 976.05(3) [Article III(a)] of the Act requires that the charge be dismissed if not brought to trial within 180 days.

The Act also provides a procedure enabling the charging jurisdiction to gain custody of the prisoner for the purpose of bringing him to trial. This procedure is described in 976.05(4) [Article IV] of the Act and is initiated by the presentation of a written request for temporary custody to the proper authorities in the state where the prisoner is incarcerated. The request is presented after a detainer has been lodged against the prisoner and it is the receipt of the request for temporary custody that triggers the court appearance described in this Special Material.

State v. Aukes, 192 Wis.2d 338, 531 N.W.2d 382 (Ct. App. 1995), discusses the two different procedures available under the Interstate Agreement on Detainers. Under Article III [§ 976.05(3)] a prisoner may request a final disposition of charges pending in another state. The prisoner must be brought to trial within 180 days after the prosecutor receives the prisoner's request. Under Article IV [§ 976.05(4)], an officer of a jurisdiction in which charges are pending can request to have a prisoner returned to that jurisdiction for trial. A prisoner returned under this provision must be tried within 120 days. In Aukes, the court of appeals concluded that the 180-day limit applied to a person returned to Wisconsin from Colorado. The court also found that the 180-day limit was tolled during the time that an appeal of a suppression order was pending and that it was ultimately waived when the defendant agreed to a trial date set after the limit would have expired. That waiver can occur by conduct; express waiver on the record is not necessary.

When another jurisdiction makes a request under Article IV, the prisoner is to be brought before a court "forthwith." § 976.06. This is the court appearance addressed by this Special Material. The prisoner has the right to request a hearing to test the legality of the request and the hearing is to be held within 30 days. If a hearing is not held within the 30-day period, the original request or detainer is dismissed. State v. Sykes, 91 Wis.2d 436, 283 N.W.2d 446 (Ct. App. 1979). However, dismissal of procedurally defective detainers does not bar successive requests. In the Matter of Custody of Aiello, 166 Wis.2d 27, 479 N.W.2d 178 (Ct. App. 1991). The new request must itself satisfy the requirements of the Act, including it being approved by the court in the jurisdiction filing the request. State ex rel. Kerr v. McCaughtry, 183 Wis.2d 54, 515 N.W.2d 276 (Ct. App. 1994).

1. In the Uniform Detainer Act (Wis. Stat. § 976.05) and in this Special Material, the state requesting the custody of the prisoner is referred to as the "receiving state." Wisconsin is the "sending state." See § 976.05(2) Article II(a) and (b).

2. The Act applies to "one who has entered upon a term of imprisonment in a penal or correctional institution." (Section 976.05(3), Article III(a).) It is usually applied to inmates of the state prisons, but could also be invoked with regard to county jail inmates. The Act does not apply to persons adjudged to be mentally ill (§ 976.05(6), Article VI(b)). A separate compact exists for juveniles, see Wis. Stat. § 938.991.

3. It may be necessary for the court to issue a writ of habeas corpus as prosequendum or ad testificandum to allow the warden or other custodian to bring the prisoner from the place of his confinement to the court.

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4. See § 976.05(1), Article IV(a). A sample "Request for Temporary Custody" follows as Appendix B. It is the suggested Agreement on Detainers Form V, see Handbook on Interstate Crime Control, p. 106.

5. Section 976.05(4), Article IV(b) provides that upon receiving a request for temporary custody, the warden or other custodian shall furnish the requesting officer with a certificate specifying the term of the prisoner's commitment, the time already served, the time remaining to be served, the amount of good time earned, the parole eligibility date, and any parole board decisions. Such a certificate is also to be sent to any other officials in the receiving state who have lodged detainers against the prisoner, thus alerting those officials to the possible availability of the prisoner. Therefore trial on other charges could result when the prisoner is returned to the receiving state.

6. Section 976.05(4), Article IV(c).

7. Section 976.05(4), Article IV(a) states in part:

> . . . and that there shall be a period of 30 days after receipt by the appropriate authorities before the request is honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability either upon the governor's own motion or upon motion of the prisoner.

Garner, supra, held, and new § 976.06 requires, that the prisoner be advised of the right to petition the governor.

8. Section 976.05(4), Article IV (d).

9. The decision in Garner, supra, required that the prisoner be advised of his right to contest delivery under the detainer, "either by petitioning the governor or by going to court." (Garner, supra, at 585.) Section 976.06 requires that the prisoner be advised of both rights and says that the court hearing scheduled if the prisoner wishes to contest the request in court must also be set within the 30-day time limit applicable to the governor's denial of the request (see note 6, supra). There is no indication whether a prisoner may exercise both rights in a single case or must elect between petitioning the governor and contesting the request in court.

10. Section 976.06 was modelled after § 976.03(10) of the Uniform Criminal Extradition Act. Therefore the issues cognizable upon habeas corpus in an extradition proceeding may offer guidance as to the issues the court can consider in the detainer case where the prisoner wishes to contest the detainer. The issues which can be raised by habeas corpus in an extradition case have been identified by the Wisconsin Supreme Court as follows:

1. Are the papers in order and properly authenticated?
2. Was a crime substantially charged under the law of the demanding state?
3. Is the petitioner the person named in the papers (identity)?
4. Was the petitioner present in the demanding state at the time of the alleged offense (fugitive status)?

State v. Ritter, 74 Wis.2d 227, 246 N.W.2d 552 (1976).

Each of these four categories, except fugitive status, should be open to inquiry in the detainer case. Guilt or innocence on the underlying charge can only be inquired into insofar as it relates to one of the

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other four issues. The receiving state's motive for demanding the prisoner's return is also irrelevant. (Handbook on Interstate Crime Control, pp. 147-154.)

Whether or not courts in the sending state can consider constitutional claims is open to question. On the one hand, the Wisconsin Supreme Court has held that trial courts in habeas corpus proceedings can "examine into constitutional questions affecting the legality of the arrest in this state for extradition at least where constitutional standards are shown not to have been complied with on the face of the documents." State ex rel. Foster v. Uttech, 31 Wis.2d 664, 671, 143 N.W.2d 500 (1966). The Uttech case has been recognized as a limited exception to the general rule that "whether correct constitutional procedures had been followed by the demanding state in obtaining the arrest of the defendant was an issue to be raised in the demanding state, not the asylum state." State v. Hughes, 68 Wis.2d 662, 670, 229 N.W.2d 655 (1975). The decision in Ritter, supra, limited the application of Uttech to the case where the alleged constitutional defect appears on the face of the papers. Where defects in the receiving state's procedures are alleged, Ritter suggests that the following practical test be applied: "Can the defects in the procedures of the demanding state be more easily raised and adequately handled in the demanding state after the accused is returned or is the decision one which the asylum state can make with comparative ease and with expertise equal to that of the demanding state, thus saving the accused the expense, inconvenience and jeopardy involved in litigating the issue in the demanding state?" (Ritter, supra at page 237.)

With respect to a specific defect, trial within 180 days as guaranteed by the Uniform Detainer Act, the Wisconsin Supreme Court has held that the claim that a prisoner was not afforded this right may not be considered in the sending state but must be decided by the courts in the receiving state. State ex rel. Garner v. Gray, 59 Wis.2d 323, 208 N.W.2d 161 (1973).

11. The court may also wish to advise the custodian of the prisoner that if the prisoner does not contest delivery, or if the governor takes no action and the prisoner does not challenge delivery in court, that the custodian may surrender the prisoner after the expiration of the 30-day period to the appropriate representative of the receiving state who shall present the following:

1. Proper identification and evidence of his or her authority to act for the state into whose temporary custody the prisoner is to be given.

2. A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(Section 976.05(5), Article V(b).)

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APPENDIX A
UNIFORM AGREEMENT ON DETAINERS: PARTY STATES

ALABAMA	Code 1975, § 15-9-81
ALASKA	AS 33.35.010 to 33.35.040
ARIZONA	A.R.S. §§ 31-481, 31-482
ARKANSAS	Ark. Stats. §§ 43-3201 to 43-3208
CALIFORNIA	West's Ann. Penal Code §§ 1389 to 1389.8
COLORADO	C.R.S. '73, §§ 24-60-501 to 24-60-507
CONNECTICUT	C.G.S.A. §§ 54-186 to 54-192
DELAWARE	11 Del. C. §§ 2540 to 2550
DISTRICT OF COLUMBIA	D.C. Code 1981, §§ 24-701 to 24-705
FLORIDA	West's F.S.A. §§ 941.45 to 941.50
GEORGIA	D.C.G.A. §§ 42-6-20 to 42-6-25
HAWAII	HRS 834-1 to 834-6
IDAHO	I.C. §§ 19-5001 to 19-5008
ILLINOIS	S.H.A. ch. 38, § 1003-8-9
INDIANA	West's A.I.C. 35-33-10-4
IOWA	I.C.A. §§ 821.1 to 821.8
KANSAS	K.S.A. §§ 22-4401 to 22-4408
KENTUCKY	KRS 440.450 to 440.510
MAINE	34-A M.R.S.A. §§ 9601 to 9609
MARYLAND	Code 1957, art. 27, §§ 616A to 616S
MASSACHUSETTS	M.G.L.A. c. 276 App. §§ 1-1 to 1-8
MICHIGAN	M.C.L.A. §§ 780.601 to 780.608
MINNESOTA	M.S.A. § 629.294
MISSOURI	V.A.M.S §§ 217.490 to 217.520
MONTANA	M.C.A. 46-31-101 to 46-31-204
NEBRASKA	R.R.S. 1943, §§ 29-759 to 29-765
NEVADA	N.R.S. §§ 178.620 to 178.640
NEW HAMPSHIRE	R.S.A. §§ 606-A:1 to 606-A:6
NEW JERSEY	N.J.S.A. §§ 2A:159A-1 to 2A:159A-15
NEW MEXICO	NMSA 1978, § 31-5-12
NEW YORK	McKinney's C.P.L. § 580.20
NORTH CAROLINA	G.S. §§ 15A-761 to 15A-767
NORTH DAKOTA	NDCC §§ 29-34-01 to 29-34-08
OHIO	R.C. §§ 2963.30 to 2963.35
OKLAHOMA	22 Okla. St. Ann. §§ 1345-1349
OREGON	ORS 135.775 to 135.793
PENNSYLVANIA	42 Pa. C.S.A. §§ 9101 to 9108
RHODE ISLAND	Gen. Laws 1956, §§ 13-13-1 to 13-13-8
SOUTH CAROLINA	Code 1976, §§ 17-11-10 to 17-11-80
SOUTH DAKOTA	SDCL §§ 23-24A-1 to 23-24A-34

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TENNESSEE	§§ 40-31-101 to 40-31-108
TEXAS	Vernon's Ann. C.C.P. art. 51.14
UTAH	U.C.A. 1953, §§ 77-29-5 to 77-29-11
VERMONT	28 V.S.A. §§ 1501 to 1509, 1531 to 1537
VIRGINIA	Code 1950, §§ 53.1-210 to 53.1-215
WASHINGTON	RCWA §§ 9.100.010 to 9.100.080
WEST VIRGINIA	Code, §§ 62-14-1 to 62-14-7
WISCONSIN	W.S.A. § 976.05, 976.06
WYOMING	W.S. 1957, §§ 7-408.9 to 7-408.15
UNITED STATES	18 U.S.C.A. App.

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APPENDIX B
AGREEMENT ON DETAINERS FORM V

Five copies. Signed copies must be sent to the prisoner and to the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

REQUEST FOR TEMPORARY CUSTODY

TO: . . . . . .
(Warden-Superintendent-Director) (Institution)
. . . . . .
(Address)

Please be advised that . . . . . ., who is presently an inmate of your institution, is under [indictment] [information] [complaint] in the . . . . . of which I am the
(Jurisdiction)
. . . . . .
(Title of Prosecuting Officer)

Said inmate is therein charged with the [offense] [offenses] enumerated below:

Offense(s)
. . . . . .
. . . . . .
. . . . . .

I propose to bring this person to trial on this [indictment] [information] [complaint] within the time specified in Article IV(c) of the agreement.

In order that proceedings in this matter may be properly hand, I hereby request temporary custody of such persons pursuant to Article IV(a) of the Agreement on Detainers.

Signed: . . . . . .
Title: . . . . . .

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: . . . . . Signed: . . . . . .
(Judge)
. . . . . .
(Court)

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WIS JI-CRIMINAL

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